SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

THE COURT OF BOSNIA AND HERZEGOVINA

Number: **X-KRŽ-07/419**

Date: **Delivered** **28 January 2011**
Sent **18 March 2011**

The Panel: **Judge Tihomir Lukes, Presiding**
Judge Azra Miletić, Reporting
Judge Patricia A. Whalen

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

RATKO BUNDALO, NEĐO ZELJAJA AND ĐORĐISLAV AŠKRABA

SECOND INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:

Munib Halilović

Defense Counsel for the Accused Ratko Bundalo:

Krešimir Zubak
Dražen Zubak

Defense Counsel for the Accused Neđo Zeljaja:

Vesna Tupajić-Škiljević
Radivoje Lazarević

Defense Counsel for the Accused Đordislav Aškraba:

Žiko Krunić
Milorad Rašević

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel, Judge Tihomir Lukes, as the Presiding Judge, and Judges Azra Miletić and Patricia Ann Whalen as the Panel members, with the participation of legal advisor Melika Murtezić as the record-taker in the criminal case of the Accused Ratko Bundalo, Neđo Zeljaja and Đorđislav Aškraba, charged with the criminal offense in violation of Article 172(1)(h), as read with sub-paragraphs a), b), d), e), f), g), i), k), in conjunction with Article 173(1)(a), c), e) and f) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), deciding on the Appeals filed by the Prosecutor's Office of Bosnia and Herzegovina, Defense Counsel for the Accused Ratko Bundalo, Attorneys Krešimir Zubak and Dražen Zubak, and Defense Counsel for the Accused Neđo Zeljaja, Attorneys Vesna Tupajić-Škiljević and Radivoje Lazarević, whereby they contest the Verdict No. X-KR-07/419 of 21 December 2009 rendered by the Court of BiH, having held a session in the presence of Munib Halilović, Prosecutor of the Prosecutor's Office of BiH, and the Accused and their Defense Counsel, on 28 January 2011 issued the following:

VERDICT

The Appeals filed by the Defense Counsel for the Accused Ratko Bundalo and Neđo Zeljaja and the Prosecutor of the Prosecutor's Office of BiH, are partially upheld and the Verdict No. X-KR-07/419 rendered by the Court of BiH on 21 December 2009 **is revised so that**:

THE ACCUSED:

1. RATKO BUNDALO, son of Luka and Milisava, maiden name Kojić, born 30 September 1944 in the village of Kriškovci, the Municipality of Laktaši, Personal Identification Number 3009944361306, Serb by ethnicity, citizen of BiH and of the Republic of Serbia, an officer in the former Yugoslav National Army - retired, of bad financial standing, graduate of the Military Academy and the Higher Military and Political School, married, father of two children, with current address in Banja Luka, at 15 *Srpskih Dobrovoljaca Street*, awarded several medals before the war and the *Karađorđe's Star* after the war, no other criminal proceedings are pending against him, in custody since 31 August 2007 pursuant to the Decision of the Court number X-KRN-07/419 of 31 August 2007,

2. NEĐO ZELJAJA, son of Gojko and Zorka, maiden name Batinić, born on 21 August 1947 in the village of Grab, the Municipality of Trnovo, Personal Identification Number 2108947171928, Serb by ethnicity, citizen of BiH, retired, of bad financial standing, completed his compulsory military service in Skopje, the Republic of Macedonia in 1965/66, residing in Kalinovik, at 7 *Omladinska Street*, no other criminal proceedings are pending against him, was in custody from 29 November 2007 to 17 July 2008 pursuant to the Decision of the Court of BiH number X-KR-07/419 of 29 November 2007, and from 21 August 2008 further on, into which he was ordered under the Decision of the Appellate Panel of this Court number X-KR 07/419 of 21 August 2008,

I

HAVE BEEN FOUND GUILTY

In as much as they:

During the period from May 1992 until March 1993, within a widespread and systematic attack by the Army of Republika Srpska ("VRS") , police and paramilitary units against the Bosniak civilian population of the Kalinovik Municipality, Ratko Bundalo as the Commander of the Kalinovik Tactical Group ("TG"), Neđo Zeljaja as the Commander of the Kalinovik Public Security Station ("SJB"), by virtue of their positions in the military and police structures, aware of the attack and knowing their actions constituted part of the attack, **ordered and perpetrated the persecution** of the Bosniak population of the Kalinovik Municipality on religious and ethnic grounds by way of killings, forcible transfer of population, unlawful imprisonment, rapes, forced disappearances, arbitrary destruction of property on a large scale, causing great suffering and injury to body, by applying measures of intimidation and terror and other inhumane acts of a similar character, in the way that:

1. Ratko Bundalo and Neđo Zeljaja

a) In early May 1992, on the order of Ratko Bundalo, members of the military and members of the Kalinovik Police Station, with the personal participation of Neđo Zeljaja as the Commander, surrounded and captured approximately 280 Bosniak civilians from the local community of Jeleč, Municipality of Foča, who, fleeing the attack of the "Serb Armed Forces", attempted to cross through the territory of the Kalinovik Municipality, in the area of the settlement of

Jažići in the Municipality of Kalinovik, after which men were forcibly separated from women, children and the elderly and detained at the *Miladin Radojević* Elementary School, where they were guarded by police officers of the Kalinovik SJB, while food for the detained men was being provided by the army from the military barracks of *Gornji Logor* in Kalinovik, which was under the command of Ratko Bundalo. A couple of days later, the detained civilians from Jeleč, some 50 of them, including: Ahmo Mušanović, Asim Zametica, Rasim Džubur, witness X, Ahmo Zametica, Nedžad Mušanović, Kasim Mušanović, Muamer Mušanović, Mirzo Mušanović, Hasan Mušanović, Edhem Mušanović and others, were transported by Ratko Bundalo through his subordinate officers and soldiers to the Bileća camp, where they stayed for approximately 20 days and were then brought back to Kalinovik, where they stayed again one night at the *Miladin Radojević* School, after which, with the participation of police officers of the Kalinovik SJB, the soldiers transferred them to the KPD Foča /Penal-Correctional Institution/.

b) In early July 1992, they ordered members of military and police forces of the Kalinovik municipality to capture approximately 200 Bosniak civilians, mostly women and children, as well as a relatively small number of men from the area of Gacko Municipality, after which the civilians were first detained at the school in Ulog and the following day they had them transported and detained at the *Miladin Radojević* School, where they were placed on the ground floor, in the gym, the staff meeting room and one classroom; the guarding of the civilians was carried out by Neđo Zeljaja with the police officers of the Kalinovik SJB,

c) On 1 August 1992, they organized an attack on the Bosniak civilian population of the village of Jelašca, Municipality of Kalinovik, where at the time there were only women, children and some elderly people; the police officers of the Kalinovik SJB surrounded the village and captured the women and children, burning some Bosniak houses in the process, while members of the army under the command of Ratko Bundalo, using an anti-aircraft gun located in the area of Brdo, near the Badnjar houses, provided artillery support to the attack, in the course of which in the hamlet of Karaula Derviša Pervan was killed and a young girl Mirveta Pervan was wounded, and, using incendiary bullets, they set houses in this hamlet on fire and detained the captured civilians at the *Miladin Radojević* Elementary School, in the rooms on the upper floor: That same night the remaining civilians (except for older persons who were unable to walk across the hill) from Vihovići, Mjehovina and other neighbouring villages, fleeing from the attack, left the Kalinovik Municipality. The body of Derviša Pervan was taken to an unknown location and she is still reported missing;

d) During the period from June 1992 until 18 September 1992, they put in serious danger the life of Huso Tukelija, who was detained in the cellar of the Kalinovik SJB, and subjected him to mental suffering by using him as a driver for mine detection. He had to drive a cargo vehicle ahead of military and civilian convoys down the road from Kalinovik to Miljevina, with police escort by the Kalinovik SJB being assigned under the duty schedule by Neđo Zeljaja; while driving a vehicle in this capacity he came across mines on 3 different occasions, all resulting in the destruction of the vehicle he was driving, but he managed to survive;

e) During the period from September 1992 until March 1993, civilians K.G. and FWS-130, whom Ratko Bundalo personally took over from the Foča KPD, were brought to the Kalinovik SJB, detained them there and used them as drivers for mine detection, exposing them to mortal danger and mental suffering;

f) During July or August 1992, Ratko Bundalo issued and Neđo Zeljaja, together with military officers and senior officers at the Kalinovik SJB, executed the order to set on fire Bosniak villages in the Municipality of Kalinovik, as follows: Sočani, Daganj, Bojići, Hotovlje, Luke, Kutine and others; Neđo Zeljaja with the police set on fire the village of Sočani, while the soldiers set ablaze the other mentioned villages;

i) In late August 1992, they organized the exchange of women detained at the *Miladin Radojević* Elementary School for the Serb soldiers killed in the area of Jakomišlje; they organized the exchange in the manner that the women, by risking their lives, were forced to pull out the killed Serb soldiers from the front line and bring them to the place of exchange, after which they were allowed, with their children, to cross over to the territory controlled by the Army of BiH; this manner of exchange was approved by Ratko Bundalo;

2. Neđo Zeljaja

a) On 25 June 1992 and on the following days, Neđo Zeljaja, as the Commander of the Kalinovik SJB, upon the decision by the Crisis Staff of the Kalinovik Municipality, organized and personally participated in the arrests of Bosniak men in Kalinovik and the surrounding villages of Mjehovina, Jelašca and Vihovići; they detained the arrested civilians, some 60 (sixty) of them, at the Gym of the *Miladin Radojević* Elementary School, where they were guarded by the police officers of the Kalinovik SJB, and where they stayed until 7 July or close to that date, which is when the transfer

of the detained Bosniaks was organized from the *Miladin Radojević* Elementary School to the *Barutni Magacin* camp,

b) During the period from May 1992 until March 1993, in the detention premises of the Kalinovik SJB, lacking any legal grounds, he kept in detention the civilians Tahir Panjeta, Kasim Bojičić, K.G, FWS-130, hodja /*Islamic cleric*/ Jašar Vuk and others;

3. Neđo Zeljaja

During the period from June to at least September 1992, he took part in the forming and organized the operation of the prison at the *Miladin Radojević* Elementary School in order to unlawfully detain the Bosniak population therein; thus, they kept about 300 Bosniak civilians from the area of the Kalinovik Municipality, parts of the civilian population from the Municipalities of Gacko, Nevesinje, Foča and Trnovo in the *Miladin Radojević* Elementary School building, in the rooms that were inadequate, lacking adequate accommodation necessities, without the possibility to attend to the basic hygienic needs, with very meagre daily food rations, subjected to rapes, murders, inhuman treatment and various physical and mental abuse and humiliation by "Serb Armed Forces" soldiers whom the guards would allow to enter freely, whereby Neđo Zeljaja, as the Commander of the Kalinovik SJB and as the person directly superior to the police officers on guard duty at the *Miladin Radojević* Elementary School, was assigning police officers to the guard duty, was informed by them of the crimes in which his subordinate officers and other persons were taking part, and in spite of that continued to maintain such guard system, which resulted in the following:

a) In early August 1992 or approximately at that time, members of the Foča TG military unit from Miljevina, whom the police officers securing the premises allowed to enter the school freely, seized all money and jewellery from the detained civilians;

b) During August 1992, from the *Miladin Radojević* Elementary School, members of the unit from Miljevina, who were within the Foča Tactical Group, used to come on a daily basis and enter the school freely, took seven mostly minor detained girls from the school to Miljevina and Foča, of whom at least two women were kept over a fairly long period of time in sexual enslavement.

c) During August 1992, a number of detained women were raped on several occasions on the premises of the *Miladin Radojević* Elementary School, by various soldiers, members of the "Serb

Armed Forces", who were permitted by certain police officers to enter the school freely, and some of whom were also present during the rape;

d) During August 1992, unknown soldiers of the "Serb Armed Forces" took Edin Bičo, Suad Hasanbegović and Sejdo Kešo from the classroom in which the detained civilians were placed to a neighbouring room where they physically abused them, after which shots were heard and the following morning the soldiers took out of the school three bodies in military blankets and transported them by a cargo vehicle to *Grajsensko Polje*, Municipality of Kalinovik, whereas during that time the police officers did not allow the prisoners to go to the corridors, threatening to kill anyone who would do so; the bodies of the killed persons have still not been identified and they are still reported missing;

e) During August 1992, members of the unit from Miljevina within the Foča Tactical Group and other unknown soldiers of the "Serb Armed Forces" took Azemina Pervan, Fatima Pervan, the boy Almir Kadrić, Zulfo Kadrić, Murat Redžović, Mujo Pervan and Hašim Hatić from the prison in the *Miladin Radojević* Elementary School, whereas the bodies of Murat Redžović, Mujo Pervan and Zulfo Kadrić were recovered and identified after the war, while Azemina Pervan, Fatima Pervan, Almir Kadrić and Hašim Hatić are still reported missing;

f) During August 1992, the detained women were on several occasions taken from the *Miladin Radojević* Elementary School by unknown soldiers of the "Serb Armed Forces" to the weekend house of Mustafa Sabljica in Mjehovina, where members of an unknown military unit were quartered; the women were taken from the school in the manner that the soldiers would ride horses and the women would walk beside them; at the weekend house they would be raped repeatedly and physically abused, after which they would be returned to the school by the soldiers or by individual police officers.

4. Ratko Bundalo

In July and August 1992 Ratko Bundalo actively participated in the forming and organization of the operations of the *Barutni Magacin* camp in Kalinovik, in which practically the entire Bosniak male civilian population of Kalinovik and the surrounding villages and a part of the captured civilians from Trnovo and Jeleč in the Municipality of Foča were illegally detained and the civilians were detained under inhuman conditions without sufficient food and water, without being able to attend to the basic hygienic needs, they were taken for forced labour and to the front lines,

physically abused and eventually killed by the police officers of the Kalinovik SJB which resulted in the following:

a) On 2 August 1992, the civilians Jakub Muslim and Osman Mandra were taken out of the *Barutni Magacin* camp, and have been unaccounted for ever since;

b) On 3 August 1992, the civilians Remzo Suljić, Nasuf Bičo, Nezir Rogoj and Zaim Čusto were taken out of the *Barutni Magacin* camp, and were found dead on the same day in the area of Rogoj, their hands tied by police handcuffs two and two together;

c) On 4 August 1992, Mustafa Šorlija was taken out of the camp, and his dead body has been exhumed in the area of the Foča municipality;

d) On 5 August 1992, upon approval from the Command of the TG from Kalinovik and the Chief of the Kalinovik SJB, Pero Elez and other unidentified soldiers of the "Serb Armed Forces" were allowed to take over the following 12 detained civilians to be allegedly taken to the Foča KPD: Salko Bičo, Ismet Hatić, Fikret Karaman, Mirsad Karaman, Salko Kurtović, Safet Suljić, Hasan Suljić, Mustafa Mušanović, Vehbija Dudo, Šaban Pločo, Meša Sačić and Edin Hadžić; these soldiers loaded the detained civilians onto a *FAP* truck and drove them in the direction of *Mehka Brda*, where they killed them, after which the empty truck returned to *Barutni Magacin*; those civilians were exhumed and identified after the war, except for Hasan Suljić and Mustafa Mušanović, who are still reported missing;

e) On 5 August 1992, somewhat later, in the same manner the same soldiers took Nedžib Pervan, Zijo Pervan and Muzafer Sačić from the *Barutni Magacin* camp and in the direction of Kalinovik, and they are still reported missing;

f) On 5 August 1992, in the afternoon hours, Pero Elez's soldiers took away all the remaining prisoners, tied them with wire, loaded them onto three trucks, in the process of which they were punching, kicking and hitting them with wooden sticks and, escorted by a police vehicle with rotating lights, drove them in the direction of Miljevina, Municipality of Foča; in the place of Ratine, Municipality of Foča, they stopped the column and took the following 24 detainees from the last truck in the column: Enes Hadžić, Esad Hadžić, Hasan Hadžić, Selim Hadžić, Mehmed Ahmethodžić, Avdija Škoro, Salko Vranović, doctor Abdurahman Filipović, Almir Čusto, Husnija Rogoj, Refik Rogoj, Elvir Suljić, Ramiz Suljić, Emir Suljić, Ramo Kurtović, Mirso Suljić,

Damir Suljić, Edin Suljić a.k.a. Čiča, Suad Suljić a.k.a. Medo, Sado Suljić, Ismet Smječanin and Adil Mulaomerović and Sabahudin Juković, lined them up above the stable of Mustafa Tuzlak which is close to the road, after which they opened fire at the detainees using firearms and killed them all except Fejzija Hadžić, who was wounded in the leg but pretended to be dead, they threw the bodies of those killed into the upper part of the stable where there was hay, they lit the gasoline and set it on fire, while the wounded Fejzija Hadžić, after the remaining two trucks with the detainees had gone ahead, managed to get out of the stable and ran away, while the remaining two trucks with the detainees were driven in the direction of Miljevina, to the location called Tuneli /tunnels/, Municipality of Foča, where they killed all the remaining detainees from Barutni Magacin, of which after the war exhumed and identified were: Adem (father's name Hasim) Hatić, Adem (Began) Mustajbegović, Ramiz (Avdo) Kešo, Asim (Hamid) Pervan, Veiz (Hasan) Hadžić, Bećir (Bajro) Pervan, Hamdo (Hasan) Pervan, Hasan (Alija) Mušanović, Hilmo (Meša) Suljić, Ibrahim (Fadil) Bajrić, Kasim (Meša) Suljić, Fehim (Meša) Suljić, Bajro (Hasan) Pervan, Avdo (Šaban) Kešo, Safet (Avdo) Mušanović, Vejsil (Nasuf) Kečo, Nasuf (Ramo) Hadžić, Munib (Adem) Velić, Ramo (Mujo) Suljić, Fehim (Omer) Srnja, Jusuf (Huso) Hadžić, Muharem (Mujo) Bičo, Edhem (Smajo) Hadžić, Vahid (Omer) Hadžić, Adem (Bećir) Hatić, Ibro (Bajro) Pervan, Salko (Nasuf) Suljić, Rašid (Murat) Redžović, Hilmo (Meho) Jašarević, Adem (Meša) Suljić, Smajl (Smajo) Hadžić, Esad (Ahmed) Hadžimuratović, Ahmet Hadžić, and the remaining detainees Hilmo Rogoj, Muhamed Čusto, Džafer Kešo, Sevdo Suljić, Smajo Ćemo, Alija Šemić are still reported missing;

whereby they committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) (persecution) in conjunction with Article 29 of the CC of BiH,

the Accused Ratko Bundalo:

- by the actions described in Counts 1a, b, c and e by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, deportation or forcible transfer of population,
- by the actions described in Count 1c also by way of application of measures of intimidation and terror,
- by the actions described in Count 1d, e and i by way of other inhumane acts of a similar character intentionally causing great suffering,
- by the actions described in Count 1f by way of illegal and self-willed large scale destruction of property that is not justified by military needs,

- by the actions described in Counts 4.a, b, c, d, e and f by way of murder and imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law;

the Accused Neđo Zeljaja:

- by the actions described in Counts 1a, b, c and e by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, deportation or forcible transfer of population,
- by the actions described in Count 1c also by way of application of measures of intimidation and terror,
- by the actions described in Count 1d, e, i by way of other inhumane acts of a similar character intentionally causing great suffering,
- by the actions described in Counts 1f by way of illegal and self-willed large scale destruction of property that is not justified by military needs,
- by the actions described in Counts 2 a, b by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law,
- by the actions described in Counts 3a, b, c, d, e and by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law,
- In Count 3a also by way of other inhumane acts of a similar character intentionally causing great suffering,
- In Counts 3b, c, f also by way of rape,
- In Counts 3d, e also by way of murder.

Therefore, pursuant to Article 285 of the CPC of BiH, having applied Articles 39, 42 and 48 of the CC of BiH, the Court of BiH

S E N T E N C E S

THE ACCUSED RATKO BUNDALO TO LONG TERM IMPRISONMENT FOR A TERM OF 22 (TWENTY-TWO) YEARS,

THE ACCUSED NEĐO ZELJAJA TO IMPRISONMENT FOR A TERM OF 15 (FIFTEEN) YEARS,

Pursuant to Article 56 of the CC of BiH, the time that the Accused Ratko Bundalo and Neđo Zeljaja spent in custody shall be credited towards the sentence of imprisonment, namely with regard to the Accused Ratko Bundalo the time he spent in custody under the Decision of the Court number X-KRN-07/419 from 31 August 2007 onwards, and with regard to the Accused Neđo Zeljaja the time that he spent in custody starting from 29 November 2007 to 17 July 2008 under the Decision of the Court number X-KR-07/419 dated 29 November 2007, and from 21 August 2008 further on under the Decision of the Appellate Panel of the Court of BiH number X-KR-07/419 of 21 August 2008.

Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), the Accused are relieved of the duty to reimburse the costs of the criminal proceedings and the lump sum, which will all be paid entirely from the Court's budget appropriations.

Pursuant to Article 198(2) of the CPC of BiH, the injured parties are instructed to take civil action to pursue their claims under property law.

II

Pursuant to Article 284(a) and (c) of the CPC of BiH, in conjunction with Article 314(1) of the CPC of BiH

the Accused Ratko Bundalo and the Accused Neđo Zeljaja

ARE ACQUITTED OF THE CHARGES

1. **Ratko Bundalo**

a) On 25 June 1992 and on the following days, Neđo Zeljaja, as the Commander of the Kalinovik SJB, upon the decision by the Crisis Staff of the Kalinovik Municipality, organized and personally participated in the arrests of Bosniak men in Kalinovik and the surrounding villages of Mjehovina, Jelašca and Vihovići; they detained the arrested civilians, some 60 (sixty) of them, at the Gym of the *Miladin Radojević* Elementary School, where they were guarded by the police officers

of the Kalinovik SJB, and where they stayed until 7 July or close to that date, which is when the transfer of the detained Bosniaks was organized from the *Miladin Radojević* Elementary School to the *Barutni Magacin* camp,

b) During the period from May 1992 until March 1993, in the detention premises of the Kalinovik SJB, lacking any legal grounds, he kept in detention the civilians Tahir Panjeta, Kasim Bojičić, K.G., FWS-130, hodja Jašar Vuk and others;

c) During the period from June to at least September 1992, he took part in the forming and organized the operation of the prison at the *Miladin Radojević* Elementary School in order to unlawfully detain Bosniak population therein; thus, they kept about 300 Bosniak civilians from the area of the Kalinovik Municipality, parts of the civilian population from the municipalities of Gacko, Nevesinje, Foča and Trnovo in the *Miladin Radojević* Elementary School building, in the rooms that were inadequate, lacking adequate accommodation necessities, without the possibility to attend the basic hygienic needs, with very meagre daily food rations, exposed to rapes, murders, inhuman treatment and various physical and mental abuse and humiliation by Serb Armed Forces soldiers whom the guards would allow to enter freely, whereby Neđo Zeljaja, as the Commander of the Kalinovik SJB and as the person directly superior to the police officers on guard duty at the *Miladin Radojević* Elementary School, was assigning police officers to the guard duty, was informed by them of the crimes in which his subordinate officers and other persons were taking part, and in spite of that continued to maintain such guard system, which resulted in the following:

d) In early August 1992 or approximately at that time, members of the Foča TG military unit from Miljevina, whom the police officers securing the premises allowed to enter the school freely, seized all money and jewellery from the detained civilians;

e) During August 1992, from the *Miladin Radojević* Elementary School, members of the unit from Miljevina, who were within the Foča Tactical Group, who would come on a daily basis and enter the school freely, took seven mostly minor detained girls from the school to Miljevina and Foča, of whom at least two women were kept for a longer period of time in sexual enslavement.

f) During August 1992, a number of detained women were raped on several occasions on the premises of the *Miladin Radojević* Elementary School, by various soldiers, members of the Serb Armed Forces, who were permitted by certain police officers to enter the school freely, and some of whom were also present during the rape;

g) During August 1992, unknown soldiers of the Serb Armed Forces took Edin Bičo, Suad Hasanbegović and Sejdo Kešo from the classroom in which the detained civilians were placed to a neighbouring room where they physically abused them, after which shots were heard and the next morning the soldiers took out of the school three bodies in military blankets and transported them by a cargo vehicle to Grajsensko Polje /fields of Grajsensko/, Municipality of Kalinovik, whereas during that time the police officers did not allow the prisoners to go to the corridors, threatening to kill anyone who would do so; the bodies of the killed persons have still not been identified and they are still reported missing;

h) During August 1992, members of the unit from Miljevina within the Foča Tactical Group and other unknown soldiers of the Serb armed forces took Azemina Pervan, Fatima Pervan, the boy named Almir Kadrić, Zulfo Kadrić, Murat Redžović, Mujo Pervan and Hašim Hatić from the prison in the *Miladin Radojević* Elementary School, whereas the bodies of Murat Redžović, Mujo Pervan and Zulfo Kadrić were recovered and identified after the war while Azemina Pervan, Fatima Pervan, Almir Kadrić and Hašim Hatić are still reported missing;

i) During August 1992, the detained women were on several occasions taken from the *Miladin Radojević* Elementary School by unknown soldiers of the Serb armed forces to the weekend house of Mustafa Sabljica in Mjehovina, where members of an unknown military unit were quartered; the women were taken from the school in the manner that the soldiers would ride horses and the women would walk beside them; at the weekend house they would be raped repeatedly and physically abused, after which they would be returned to the school by the soldiers or by individual police officers.

Ratko Bundalo and Neđo Zeljaja

c) On or about 4 August 1992, in the village of Jelašca, the Municipality of Kalinovik, unknown members of the Serb Armed Forces, killed 7 civilians, mostly elderly persons, as follows: Ćamil Karaman, Duda Karaman, Hajdar Pervan, Muškija Rogoj, Derviš Rogoj, Hajro Pervan and Rifo Bičo; these civilians have been exhumed and identified, except for Rifo Bičo and Hajro Pervan, who are still reported missing;

d) On or about 5 August 1992, in the village of Jezero, Municipality of Kalinovik, unknown members of the Serb Armed Forces killed Nezir Delberović, Mešan Đipa, Mustafa Đipa, Salko Đipa and Hasan Đipa, who were buried in a mass grave in the fields of Prezren, the village of

Jezero; on 15 July 1999 their mortal remains were exhumed and identified;

e) On or about 5 August 1992, unknown members of the Serb Armed Forces in the village of Mjehovina, the Municipality of Kalinovik, deprived the lives of Salko Filipović and his wife Rabija Filipović, Mustafa Hadžić, Ćamil Hadžić and his wife Aiša Hadžić, Nura Mrzić and Huso Hadžić, all rather elderly civilians, who were buried into a mass grave at the local Muslim cemetery, and in the following days police officers of the Kalinovik SJB deprived of liberty the 5 Bosniak civilians who had survived and detained them to the prison at the *Miladin Radojević* Elementary School in Kalinovik;

f) In early August, they kept all detained civilians for four days without any food rations;

g) The detained women and men were almost daily physically abused by soldiers and in the presence of the police officers from security; thus on 8 August 1992, Zlata Redžović was being beaten for several hours by members of Pero Elez's unit, in the course of which they were beating her all over the body, asking her to tell them where her son was, they were stabbing her with a knife, forcing her to cross herself and threatening to rape her and also forcing her to watch the abuse of Edin Bičo, who was lying in a trough full of water, while water was pouring on him from the open faucets.

h) During August 1992, unknown soldiers took a group of women and Zijo Hadžić from the *Miladin Radojević* Elementary School, loaded them onto a truck and drove them to the Pavlovac Farm, where they kept beating Zijo Hadžić heavily until he was left lying on the ground immobile, while they took the women into the farm premises, where they raped them.

whereby they committed

the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), as read with subparagraphs g) and k) of the same Article of the CC of BiH, all in conjunction with Article 180(1) of the CC of BiH.

III

Pursuant to Article 314(1), in conjunction with article 297(1)(j) of the CPC of BiH and Article 6(1) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) the following charges against the Accused Neđo Zeljaja.

ARE HEREBY DISMISSED

In July and August 1992 Ratko Bundalo actively participated in the forming and he organized the operations of the *Barutni Magacin* camp in Kalinovik, in which illegally detained was practically the entire Bosniak male civilian population of Kalinovik and the surrounding villages, a part of the captured civilians from Trnovo and Jeleč in the municipality of Foča, in which civilians were detained under inhuman conditions without sufficient food and water, without being able to attend the basic hygienic needs, they were being taken for forced labor and to the front lines, physically abused and eventually killed by the police officers of the Kalinovik SJB:

a) On 2 August 1992, the civilians Jakub Muslim and Osman Mandra were taken out of the *Barutni Magacin* camp, and have been unaccounted for ever since;

b) On 3 August 1992, the civilians Remzo Suljić, Nasuf Bičo, Nezir Rogoj and Zaim Čusto were taken out of the *Barutni Magacin* camp, and were found dead on the same day in the area of Rogoj, their hands tied by police handcuffs two and two together;

c) On 4 August 1992, Mustafa Šorlija was taken out of the camp, and his dead body has been exhumed in the area of the Foča Municipality;

d) On 5 August 1992, upon approval from the Command of the TG from Kalinovik and the Chief of the Kalinovik SJB, Pero Elez and other unidentified soldiers of the Serb armed forces were allowed to take over 12 detained civilians to be allegedly taken to the Foča KPD, as follows: Salko Bičo, Ismet Hatić, Fikret Karaman, Mirsad Karaman, Salko Kurtović, Safet Suljić, Hasan Suljić, Mustafa Mušanović, Vehbija Dudo, Šaban Pločo, Meša Sačić and Edin Hadžić; these soldiers loaded the detained civilians onto a FAP truck and drove them in the direction of Mehka Brda, where they killed them, after which the empty truck returned to *Barutni Magacin*; those civilians were exhumed and identified after the war, except for Hasan Suljić and Mustafa Mušanović, who are still reported missing;

e) On 5 August 1992, somewhat later, in the same manner the same soldiers took Nedžib Pervan, Zijo Pervan and Muzafer Sačić from the *Barutni Magacin* camp and in the direction of Kalinovik, and they are still reported missing;

f) On 5 August 1992, in the afternoon hours, Pero Elez's soldiers took away all the remaining

prisoners, tied them with wire, loaded them onto three trucks, in the process of which they were punching and kicking them and hitting them with wooden sticks and, escorted by a police vehicle with rotating lights, drove them in the direction of Miljevina, Municipality of Foča; in the place of Ratine, Municipality of Foča, they stopped the column and took 24 detainees from the last truck in the column, as follows: Enes Hadžić, Esad Hadžić, Hasan Hadžić, Selim Hadžić, Mehmed Ahmethodžić, Avdija Škoro, Salko Vranović, doctor. Abdurahman Filipović, Almir Čusto, Husnija Rogoj, Refik Rogoj, Elvir Suljić, Ramiz Suljić, Emir Suljić, Ramo Kurtović, Mirso Suljić, Damir Suljić, Edin Suljić a.k.a. Čiča, Suda Suljić a.k.a. Medo, Sado Suljić, Ismet Smječanin and Adil Mulaomerović and Sabahudin Juković, lined them up above the stable of Mustafa Tuzlak which is close to the road, after which they opened fire at the detainees using firearms and killed them all but Fejzija Hadžić, who was wounded in the leg but pretended to be dead, they threw the bodies of those killed into the upper part of the stable where there was hay, they lit the gasoline and set it on fire, while the wounded Fejzija Hadžić, after the remaining two trucks with the detainees had gone ahead, managed to get out of the stable and ran away, while the remaining two trucks with the detainees were driven in the direction of Miljevina, to the location called Tuneli /tunnels/, Municipality of Foča, where they killed all the remaining detainees from Barutni Magacin, of which after the war exhumed and identified were: Adem (father's name Hasim) Hatić, Adem (Began) Mustajbegović, Ramiz (Avdo) Kešo, Asim (Hamid) Pervan, Veiz (Hasan) Hadžić, Bećir (Bajro) Pervan, Hamdo (Hasan) Pervan, Hasan (Alija) Mušanović, Hilmo (Meša) Suljić, Ibrahim (Fadil) Bajrić, Kasim (Meša) Suljić, Fehim (Meša) Suljić, Bajro (Hasan) Pervan, Avdo (Šaban) Kešo, Safet (Avdo) Mušanović, Vejsil (Nasuf) Kečo, Nasuf (Ramo) Hadžić, Munib (Adem) Velić, Ramo (Mujo) Suljić, Fehim (Omer) Srnja, Jusuf (Huso) Hadžić, Muharem (Mujo) Bičo, Edhem (Smajo) Hadžić, Vahid (Omer) Hadžić, Adem (Bećir) Hatić, Ibro (Bajro) Pervan, Salko (Nasuf) Suljić, Rašid (Murat) Redžović, Hilmo (Meho) Jašarević, Adem (Meša) Suljić, Smajl (Smajo) Hadžić, Esad (Ahmed) Hadžimuratović, Ahmet Hadžić, and the remaining detainees Hilmo Rogoj, Muhamed Čusto, Džafer Kešo, Sevdo Suljić, Smajo Ćemo, Alija Šemić are still reported missing;

whereby he committed:

the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC of BiH, as read with Article 180(1) of the CC of BiH.

IV

The part of the First Instance Verdict relevant to the Accused Đorđislav Aškraba in which **he was acquitted of the charges under Section 3 of the Operative Part of the First Instance Verdict is hereby revoked and a retrial in that part is ordered** before the Appellate Criminal Division of the Court of Bosnia and Herzegovina .

The First Instance Verdict remains unchanged in other parts.

R E A S O N I N G

I. PROCEDURAL HISTORY

A. FIRST INSTANCE VERDICT

1. By the Verdict of the Court of BiH No. X-KR-07/419 dated 21 December 2009, the Accsued Ratko Bundalo and Neđo Zeljaja were found guilty becasue the First-Accused Bundalo by the acts described in Sections 1, 1a, 1b, 1c, 1d, 1e, 1f, 1g,1h, 1i, 1j, 1l, 2, 2a, 2c, 2d, 2f, 2g, 2h, 3, 3a, 3b, 3c, 3d, 3f of the operative part, and the Second-accused Zeljaja by the acts described in Sections 1, 1a, 1b, 1c, 1d, 1e, 1f, 1g, 1h, 1i, 1j, 1l, 2, 2a, 2c, 2d, 2f, 2g, 2h, 3, 3a and 3b of the operative part, committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) in conjunction with subparagraphs (a), (d), (e), (g), (i), (k) of the CC of BiH, and in conjunction with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e) and (f) of the CC BiH, in conjunction with the criminal offense of War Crimes against Prisoners of War in violation of Article 175(1)(b) of the CC of BiH, all in conjunction with Article 180(1) of the CC of BiH.

2. The Accused Ratko Bundalo was imposed the sentence of imprisonment for a term of nineteen (19) years, while the Accused Neđo Zeljaja was sentenced to imprisonment for a term of fifteen (15) years. The time that the Accused spent in custody was credited towards the sentence of imprisonment, namely for the Accused Bundalo starting from 31 August 2007, and for the Accused Zeljaja starting from 29 November 2007.

3. Pursuant to Article 188(4) of the CPC of BiH, the Accused were relieved of the duty to reimburse the costs of the criminal proceedings. Pursuant to Article 198(2) of the CPC of BiH, the

aggrieved parties were instructed to take civil action to pursue their claims under property law.

4. Under the same Verdict, pursuant to Article 284(1)(c) of the CPC of BiH, the Accused Ratko Bundalo, Neđo Zeljaja and Đorđislav Aškraba were acquitted of some charges, namely the Accused Ratko Bundalo and Neđo Zeljaja for the actions described in Sections 2b, 2e, 2i of the operative part that they committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with subparagraphs (g) and (k) of the same Article of the CC of BiH, all in conjunction with Article 180(1) of the CC of BiH. The Accused Đorđislav Aškraba was acquitted of charges for the actions described in Sections 3, 3a, 3b, 3c, 3d, 3f, 3g, 4 of the operative part for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with subparagraphs a), d), e) and k) of the same Article of the CC of BiH, all in conjunction with Article 180(1) of the CC of BiH.

5. Pursuant to Article 189(1) of the CPC of BiH the Accused Đorđislav Aškraba is relieved of the duty to reimburse the costs of the criminal proceedings that will be paid from the Court's budget appropriations in their entirety.

B. APPEALS

6. The Prosecution filed an appeal from the First Instance Verdict on the grounds of the decision on the criminal sanction regarding the Accused Ratko Bundalo and Neđo Zeljaja and essential violations of the provisions of the criminal procedure, violations of the criminal code, incorrectly or incompletely established state of facts in relation to Đorđislav Aškraba. The Prosecution moved the Appellate Panel to alter the Verdict with regard to the decision on sentence and impose on the Accused Ratko Bundalo and Neđo Zeljaja the sentence of imprisonment considerably more severe than the statutory minimum. In relation to the Accused Đorđislav Aškraba, the Prosecution moved the Panel to revoke the Verdict and order a retrial or to alter the First Instance Verdict.

7. The Defense for the First-Accused Bundalo, Attorneys Krešimir Zubak and Dražen Zubak, timely filed an appeal from the First Instance Verdict for essential violations of the provisions of the criminal procedure, violations of the criminal code, incorrectly and incompletely established state of facts and the decision on sentence, moving the Appeallate Panel to revoke the contested Verdict, order a retrial, or to alter the Verdict by acquitting the Accused Bundalo of charges.

8. The Defense for the Second-Accused Zeljaja, Attorneys Vesna Tupajić-Škiljević and

Radivoje Lazarević also filed an appeal from the First Instance Verdict for the following reasons: essential violations of the provisions of the criminal procedure, violations of the criminal code, incorrectly and incompletely established state of facts, decision on the criminal sanction and violations of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). The Defense for the Second-Accused proposed to the Appeallate Panel to uphold the appeal in its entirety, revoke the contested Verdict and order a retrial.

9. The Defense for the Accused delivered their comments on the Prosecution appeal proposing that the appeal be refused as ungrounded.

10. At the session of the Panel held on 28 January 2011 pursuant to Article 304 of the CPC of BiH, the appellants maintained their grounds and arguments of the appeal presented in writing.

II. GENERAL ISSUES

11. Prior to providing reasoning for individual grounds of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC of BiH the appellant must include in the appeal both the legal grounds for contesting the verdict and the reasoning behind the appeal.

12. Since pursuant to Article 306 of the CPC of BiH the Appellate Panel reviews the Verdict only within the limits of the grounds of appeal, the appellant is obliged to draft the appeal in such a manner that it can serve as the basis for reviewing the Verdict.

13. In this respect, the appellant must identify the grounds for which he contests the appeal, specify which part of the verdict, evidence or action of the Court he contests, and present clear arguments in support of his claim.

14. A mere impartial indication of the grounds of appeal, like indicating the alleged irregularities in the course of the first instance proceedings without specifying the ground of appeal that the appellant invokes does not constitute a valid ground to review the first instance verdict. Therefore, the Appellate Panel dismissed as ungrounded all unreasoned and unclear grounds of appeal.

III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC OF BIH: ESSENTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE

A. STANDARDS OF REVIEW

15. A Verdict may, pursuant to Article 296 of the CPC of BiH, be contested on the grounds of essential violations of the provisions of criminal procedure. The essential violations of the criminal procedure are prescribed under Article 297 of the CPC of BiH.[1]

16. Given the gravity and importance of violations of the procedure, the CPC of BiH differentiates between the violations which, if their existence is established, create an irrefutable assumption that they negatively affected the validity of the rendered Verdict (absolutely essential violations) and the violations for which the Court evaluates, in each specific case, whether the established violation had or could have negatively affected the validity of the verdict (relatively essential violations).

17. Absolute essential violations of the CPC of BiH are listed in Article 297(1) subparagraphs a) through k) of the CPC of BiH.

18. Should the Panel establish an essential violation of the provisions of the criminal procedure, the Panel must revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC of BiH, except in the cases set forth under Article 314(1) of the CPC of BiH.[2]

[1] Article 297 **Essential Violations of the Criminal Procedure Provisions:** (1) An essential violation of the provisions of criminal procedure exists: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the verdict who did not participate in the main trial or who was disqualified from trying the case by a final decision, b) if a judge who should have been disqualified participated in the main trial, c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defense attorney or the injured party, in spite of his petition was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language, d) if the right to defense was violated, e) if the public was unlawfully excluded from the main trial u, f) if the Court violated the rules of criminal procedure on the question of whether there existed an approval of the competent authority, g) if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction, h) if, in its verdict, the Court did not entirely resolve the contents of the charge; i) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code, j) if the charge has been exceeded, k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code to the preparation of the main trial or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict.

[2] Article 314 **Revision of the First Instance Verdict:** (1) By honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different

19. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise if during the main trial or in rendering a verdict the Court did not apply a provision of the law or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict.

20. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the Appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

B. APPEALS OF THE ACCUSED RATKO BUNDALO AND NEĐO ZELJAJA

1. Sub-Ground One: Article 297(1)(d) of the CPC of BiH: The Defense argues that the right to a defense was violated

(a) The Appellate Panel is satisfied that the right to a defense was not violated and dismisses the arguments of the Appeal as unfounded.

21. According to Article 297(1)(d) of the CPC of BiH, violation of the right to a defense is one of the essential violations of the criminal procedure provisions. This implies that rules of the procedure were not applied, or they were misapplied to the detriment of the Accused by denying his right to a defense.

verdict must be rendered when the law is properly applied, according to the state of the facts and in the case of

(i) Appeal Arguments of the Accused Ratko Bundalo and Neđo Zeljaja

22. It follows from the argumentation provided by the Defense for the Accused Ratko Bundalo and Neđo Zeljaja that they claim the Trial Panel erred in using Joint Criminal Enterprise (JCE) as the mode of liability and that such a decision violated the right to a defense due to several reasons. In the first place, the Defense opposes the application of JCE and argues that the charge does not indicate the specific type of JCE; nor does it sufficiently specify the participants in the JCE, nor was there pled a specific time frame or even the existence of a plan for the JCE. The Defense therefore submits that all this amounts to a violation under Article 297(1)(d) of the CPC of BiH.

a. Findings of the Appellate Panel

23. The Appellate Panel finds that the arguments of the Defense Appeals relevant to the JCE are partially grounded. However, the Panel holds that while the Accused were not deprived of their right to a defense, the Trial Panel did misapply the provisions of the substantive law (*see* Section V). The account of facts surrounding the criminal offense the Accused are charged with is sufficient and it relies on clear legal and material grounds. Throughout the proceedings, the Accused were aware of the charges (both in terms of facts and law), therefore their right to a defense was not denied either in procedural or in substantive terms.

(ii) Appeal Arguments of the Accused Neđo Zeljaja

24. According to the Defense, the Accused was not provided with all transcripts during the main trial, but he received audio recorded material, whereby the right to a defense was violated.

a. Findings of the Appellate Panel

25. Article 253(1) of the CPC of BiH provides that if the course of the main trial was recorded in accordance with Article 155 of this Code, the transcript of the action undertaken shall, upon a reasonable request of the parties and defense attorney, be provided to the parties and defense attorney no later than three days from the day of the action undertaken in the main trial. It follows from the case file that during the proceedings the Trial Panel provided all the requested audio

violations as per Article 297, Paragraph 1, Item f) and j) of this Code.

records taken at the hearings and the Defense does not dispute that fact. Audio records are considered to be an authentic record of the main trial. It is important to note that the transcripts were prioritized so that the transcripts of the main trial at which witnesses had been heard (prosecution witnesses in particular) were made first, precisely in order to allow the Accused to be acquainted with the contents of testimony by the Prosecution witnesses in order to better prepare his defense. The Trial Panel is not bound by the law to provide all requested transcripts in writing. The Trial Panel partially granted motions by the Accused, guided by their justifiability, but also by the existing technical capacities. Also, it has to be noted that the Accused had two *ex officio* appointed attorneys during the main trial. A number of transcripts were made during the first instance proceedings (40). The main purpose of a defense team is to cooperate with the accused when preparing their defense. The argument that the Accused was not able to listen to the audio records due to technical reasons does not suffice to conclude that his right to defense was violated.

26. The Appellate Panel therefore concludes that the right to a defense was not violated, hence, the Defense incorrectly submits that Article 297(1)(d) of the CPC of BiH was violated.

(iii) Appeal Arguments of the Accused Neđo Zeljaja

27. The Defense claims that the Trial Panel violated the right to a defense by refusing to admit some particular evidence for the Defense.[3] The Defense proposes in the Appeal to be allowed to submit this as new evidence.

a. Findings of the Appellate Panel

28. Article 263(3) of the CPC of BiH provides that the judge or the presiding judge shall reject the presentation of evidence when he finds that the circumstances that a party and the defense try to prove are irrelevant to the case or that the presented evidence is unnecessary. The presiding judge is in charge of the main trial and it is his or her duty and responsibility to eliminate everything that delays the proceedings. It does not stem from the CPC of BiH that the Trial Panel must allow the presentation of each and every proposed piece of evidence. Therefore, the Trial Panel decides whether certain evidence will be presented or not and such decision is made for each individual case on the grounds of free evaluation of evidence.

[3] Proposed evidence: 1.The Decision on allocating the KPD Foča premises for accommodation of the prisoners of war and detainees, document certified by the ICTY. 2. MUP-SDB Sarajevo Document of 4 July 1995 signed by Nedžad

29. The Court is not bound to present all proposed evidence, but the Court must give the reasons for refusing to do so. The mere refusal to present a piece of evidence does not amount to an essential violation because the law does not obligate the Court to present each and every proposed piece of evidence. Specifically, Article 236(2) of the CPC of BiH provides that where the judge or the presiding judge concludes that the facts a party or defense wish to prove are irrelevant to the case or that the proposed evidence is unnecessary, they shall refuse the presentation of such piece of evidence. The refusal to present the evidence proposed by the parities or the defense does not amount to essential violation of the criminal procedure. The criminal procedure would be violated if the parties and/or the defense would not be allowed to propose their evidence.

30. In this specific case, the Trial Panel dismissed the motion by the Defense for the presentation of the mentioned evidence by finding it irrelevant to the criminal proceedings. The Defense only makes reference to certain counts of the Indictment, but it does not point to the circumstances or facts that could be proved by the stated pieces of evidence. The Defense additionally proposes in the Appeal these same pieces of evidence as new evidence to be presented in the appellate proceedings. However, the Trial Panel already adjudicated that matter by dismissing the evidence as irrelevant to the case and this conclusion is entirely upheld by the Appellate Panel. The Defense proceeds by referring to the ICTY jurisprudence and rules relevant to the admission of new evidence (for instance Rule 115 of the ICTY Rules of Procedure and Evidence). However, apart from giving their subjective opinion that the evidence would impact the decision of the Court, the Defense failed to substantiate their averments in the Appeal by any facts.

(b) Conclusion

31. In view of the foregoing, the Appellate Panel is satisfied that the Accused's right to a defense was not violated and dismisses the arguments of the Appeal as unfounded.

Ugljen, listing the names of principal implementers in the Kalinovik Municipality; 3. Chemistry Expert Report to determine when the entries were made in the evidence O3-3; 4. ICTY Rule 75H Application.

2. Sub-Ground Two: Article 297(1)(i) of the CPC of BiH: The Defense argues that the Verdict is based on evidence that may not be used as the basis of a verdict under this Code

(a) The Appellate Panel finds that the validity of the presented piece of evidence (reading out the statement of witness B) was not compromised by the argument of the Appeal, quite the opposite, this is valid evidence pursuant to Article 273(3) of the CPC of BiH. Thus, the Panel entirely dismisses the argumentation by the Defense as unfounded.

(i) Appeal Arguments of the Accused Neđo Zeljaja

32. The Defense refutes the decision made by the Trial Panel to allow reading of the Record on Examination of Witness B - No. KT-RZ-80/05, taken at the Prosecutor's Office of BiH on 8 November 2007. The Defense submits that the Trial Panel gave credence to the witness whom the Defense was not able to cross-examine and the Panel based their decision about the decisive facts on this witness' statement.

a. Findings of the Appellate Panel

33. Article 297(1)(i) of the CPC of BiH stipulates that an essential violation of the criminal procedure occurs if the verdict is based on evidence that may not be used as the basis of a verdict under the CPC of BiH.

34. Article 273(2) of the CPC of BiH foresees the exceptions from direct presentation of evidence and provides that, among other things, records on testimony given during the investigative phase may be used only if the presence of the witnesses in court is impossible or very difficult due to important reasons. The Appellate Panel is satisfied that the Trial Panel properly evaluated the facts and circumstances surrounding this specific case and applied to them Article 273(2) of the CPC of BiH. It follows from the disputed Verdict that witness B does not live in the territory of BiH and the Trial Panel was unable to make contact with him. The witness was unavailable to the Witness Support Section as well. Therefore, since it was impossible to secure the presence of the witness, the legal grounds were satisfied to render a decision in accordance with Article 273(2) of

the CPC of BiH. Contrary to the arguments by the Defense, the Trial Panel evaluated this piece of evidence individually, but also in correlation with other pieces of evidence. The convicting Verdict was not based to a decisive extent on this piece of evidence exclusively. Furthermore, it is precisely this part of the Verdict the Defense quotes in the Appeal (pages 166-167 of the BSC version) which clearly shows that the Trial Panel made its findings on the grounds of consistent testimony of witnesses, not only on the grounds of the statement given by witness B.

(b) Conclusion

35. The Appellate Panel therefore finds that the validity of the presented piece of evidence (reading out the statement of witness B) was not compromised by the argument of the Appeal, quite the opposite, this is a valid evidence pursuant to Article 273(3) of the CPC of BiH. Thus, the Panel entirely dismisses the argument by the Defense as unfounded.

3. Sub-Ground Three: Article 297(1)(j) of the CPC of BiH: The Defense argues that the charges were exceeded

(a) Contrary to the arguments of Ratko Bundalo's appeal, the Appellate Panel finds that the First Instance Verdict does not contain an essential violation set forth in Article 297(1)(j) of the CPC of BiH, that is, the charges against the Accused Ratko Bundalo were not exceeded. In regards to the appeal of Accused Neđo Zeljaja, in view of Article 280(1) of the CPC of BiH, the Appellate Panel finds that the Defense is justified in arguing that the charges were exceeded in Section 3 of the Operative Part of the First Instance Verdict, which gave rise to an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH.

36. In their Appeal, the Defense for the Accused Ratko Bundalo explains the alleged exceeding of the charges, but they (erroneously) subsume it under the violation of the right to a defense. The Appellate Panel has examined the arguments of the Appeal and the reasoning therein also within the scope of the legal provisions relevant to establishing if the charges have been exceeded. Potential exceeding of the charges ultimately results in the violation of the right to a defense, but according to the CPC of BiH it amounts to an essential violation *sui generis*[4].

(i) Appeal Arguments of the Accused Ratko Bundalo

37. The Defense for the Accused Ratko Bundalo argued that the Amended Indictment should have been submitted for confirmation since the Prosecution added the legal qualification under Article 173(1)(a), thereby expanding the charges, particularly in Counts 1 i) and 1 k). According to the Defense, such expansion of the legal qualification required amendments to the relevant Account of Facts in the Indictment, which were to the detriment of the Accused.

38. The Defense submits that the Trial Panel also violated the provisions of Article 280 of the CPC of BiH by finding that the Appellant committed War Crimes against Prisoners of War in violation of Article 175(1)(b) of the CC of BiH, thereby exceeding the charges of the Indictment, which also resulted in the violation of Article 297(1)(d) and (2) of the CPC of BiH.

a. Findings of the Appellate Panel

39. When deciding on the merits of this allegation of the Appeal, the Appellate Panel relied on the provisions of Article 280(1) of the CPC of BiH[5] which provides that the verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed. Thus, the law requires that the verdict may only refer to the person accused (subjective identity) and only to the act that is the object of the charge presented in the indictment (objective identity). The subjective identity of the indictment and the verdict is proved by establishing the identity of the person who is the subject of the criminal proceedings and the first instance verdict. The objective identity is preserved if the offense under the verdict is the same or if different from the offense charged under the indictment, it may not be graver than the one charged under the indictment.[6]

40. The comparison between the Account of Facts in the Indictment No. KT-RZ-80/05 of 23 November 2007, which was confirmed on 28 November 2007, with the Account of Facts contained in the Amended Indictment No. KT-RZ-80/05 of 13 October 2009 shows that the Prosecution did not change the Account of Facts surrounding the commission of the criminal offense the Accused was charged with so as to charge him with a graver criminal offense than that

[4][Latin "of its own kind"] Of its own kind or class; unique or peculiar. Black's Law Dictionary.
[5] Article 280 of the CPC of BiH: "(1) *The verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial*."
[6] *See* Commentary on the Criminal Procedural Codes in BiH, (Joint Project of the Council of Europe and the European Commission, Sarajevo 2005), ("Commentary on the CPCs in BiH"), p. 773 of BSC version.

contained in the confirmed Indictment. The Trial Panel was justified in concluding that the amendments to the Indictment relevant to Accused Bundalo were not such to require its submission to the preliminary hearing judge for confirmation.

41. The modifications contained in Counts 1. i) and k) of the Amended Indictment only provide more specific Account of Facts originally contained in the confirmed Indictment. Under Count 1i), the confirmed Indictment contained the names of two civilians who were imprisoned on the Kalinovik SJB premises, mentioning also "others". The Amended Indictment added the names of two more civilians (KG and FWS-130), but it also notes that *others*, too, were imprisoned on those premises. Furthermore, the Amended Indictment specifies that the "*food was provided by the army from Gornji logor"*.

42. The Appellate Panel is satisfied that the amendments to the Account of Facts under Count 1 k) of the Amended Indictment were also made to give a more precise Account of Facts than the one in the confirmed Indictment. In this Count, the Prosecution replaced the initials and pseudonyms of the civilians who were brought from the Foča KPD to the Kalinovik SJB with their full names. In addition, the act of participation of the Accused Ratko Bundalo under this Count of the Indictment was specified ("*Ratko Bundalo personally took them over from the Foča KPD and brought them to the Kalinovik SJB to work as drivers"*). Therefore, the Defense is not justified in arguing that the Accused was charged with a graver criminal offense when the act of perpetration of the criminal offense was only more precisely explained. When generally outlined facts are more precisely explained, like it was done in this instance under the adopted Amended Indictment by the First Instance Verdict, that does not affect the subjective (the Accused) or the objective (the charges) identity between the Indictment and the Verdict.

43. The Defense for the Accused Ratko Bundalo erroneously argues that the Trial Panel exceeded the charges by changing the time period specified in the Indictment "from April 1992 to March 1993" to the period "from May 1992 to March 1993". Amendments which do not change the elements of the criminal offense and which do not affect the legal qualification of the offenses of which the Accused is found guilty do not amount to exceeding the charges. The time of the perpetration of the criminal offense is a relevant fact that has to be established in the criminal proceedings, but it is not an essential element of the criminal offense the Accused are charged with. In addition, the intervention made by the Trial Panel resulted from the presented evidence and it was made within the time period specified in the Indictment. The Trial Panel did not change the time period to the detriment of the Accused, nor was he charged with more criminal quantity. Thus,

the Appellate Panel is satisfied that the charges were not exceeded.

44. The Appellate Panel holds that the Trial Panel did not exceed the charges by joining the accounts of facts under Count 1 a) and b) into one Section – 1 a) of the Operative Part of the First Instance Verdict. The Amended Indictment clearly shows that the sequence of time and events from Count 1 a) is continued in Count 1 b) Under Count 1 a), the Prosecution explained in detail how the civilians from the local community of Jeleč, Foča Municipality, had been captured and he proceeded by explaining in the following Count what had happened further to the captured civilians of Jeleč. The Account of Facts both in the Indictment and in the Operative Part of the Verdict should contain the time of the perpetration of the criminal offense. However, so complex incidents described under several Counts and Sub-counts do not require specifying the time period of perpetration in every Count or Sub-Count if it has already been specified in the introductory part as relevant to every Count, or if it is clear that a certain incident continues from one count to another. Where the sequence of events leaves no doubt that one incident followed another one for which the time was precisely stated, the Appellate Panel is satisfied that the time period is sufficiently determined even though it does not contain the precise date. Therefore, the intervention made by the Trial Panel was only aimed at giving a more precise explanation of the existing facts, whereby the charges were not exceeded.

45. The Defense also erroneously claims that the charges were exceeded by expanding the legal qualification (Article 173 of CC of BiH). The Court is not bound by the legal qualification of the offense contained in the Indictment (Amended Indictment). The legal qualification may be changed on condition that the criminal offense is included in the Account of Facts of the Indictment and that it is not a more serious offense. Under the confirmed Indictment, the Accused was charged with the criminal offense of Crimes against Humanity by persecution in violation of Article 172(1)(h) of the CC of BiH. This criminal offense pursuant to the legal definition can be perpetrated "in connection with any offense listed in this paragraph of this Code, any offense listed in this Code or any offense falling under the competence of the Court of Bosnia and Herzegovina."[7] It clearly follows from the quoted legal provision and from the comparison between the amended and the confirmed Indictment that in the Amended Indictment the Prosecution did not exceed the charges of the confirmed Indictment, but he only gave a more specific legal qualification of the offense the Accused was originally charged with. In view of the offense the Accused are charged with and its legal qualification, it cannot be said that giving a more precise explanation of the legal qualification is to the detriment of the Accused, since the basis of the legal qualification remained the same. This

[7] *See* Article 172(1)(h) of the CC of BiH.

specific explanation did not materially change the legal qualification of the offense and it does not amount to the aggravated form of the offense. Under the Amended Indictment, too, the Accused are charged with the criminal offense of Crimes against Humanity by persecution in violation of Article 172(1)(h) of the CC of BiH, but only the manner of the perpetration of the persecution was more specifically explained and no significant changes to the facts were made. The Defense does not argue that amendments were made to the Account of Facts of the Indictment that could have resulted in a changed legal qualification; the Defense rather argues that changes in the legal qualification as such amount to exceeding the charges also with regard to the Account of Facts.

46. The facts in the Amended Indictment were not changed to such an extent to exceed the charges, the amendments were intended to give a more precise Account of Facts surrounding the commission of the criminal offense as followed from the presented evidence at the main trial, which precisely is the purpose of Article 275 of the CPC of BiH. The ground of the Appeal and the allegations by the Defense for the Accused Bundalo that the charges were exceeded are entirely unfounded. In this specific case, the charges were not exceeded, nor was Article 297(1)(j) CPC of BiH violated. Since the Panel has found that the charges were not exceeded, the right to a defense guaranteed under Article 297(1)(d) of the CPC of BiH was not violated, as the Defense incorrectly submits.

(b) Conclusion

47. Contrary to the arguments of Ratko Bundalo's appeal, the Appellate Panel finds that the First Instance Verdict does not contain an essential violation set forth in Article 297(1)(j) of the CPC of BiH, that is, the charges against the Accused Ratko Bundalo were not exceeded

(i) Appeal Arguments of the Accused Neđo Zeljaja

48. The Defense submits that the charges were exceeded under the First Instance Verdict given that Counts 3, 3a) and 3b) relevant to the Accused Zeljaja were added after the completion of the main trial. The charges were exceeded by finding the Accused guilty under the First Instance Verdict, which resulted in an essential violation of the criminal procedure provision under Article 297(1)(j) of the CPC of BiH.

a. Findings of the Appellate Panel

49. Under the confirmed Indictment No. KT-RZ-80/05 of 23 November 2007, the Accused Ratko Bundalo and Đorđislav Aškraba were charged with the commission of the offenses under Count 3, however, in the Amended Indictment No. KT-RZ-80/05 of 13 October 2009 the Prosecution amended Count 3 of the Indictment by charging the Accused Neđo Zeljaja, too, with the same offenses. Neđo Zeljaja was found guilty under the First Instance Verdict of the offenses under Counts 3, 3a) and 3b) of the Operative Part of the First Instance Verdict.

50. The Appellate Panel finds that the Trial Panel erroneously concluded that the amendments to the Indictment relevant to Neđo Zeljaja did not amount to exceeding the charges. Under the confirmed Indictment, the Accused Neđo Zeljaja was not charged with committing or otherwise participating in the acts referred to in Count 3 of the Indictment. Under the Amended Indictment, however, the Accused was charged with an additional criminal offense. This undoubtedly follows from the fact that the Accused was charged at the main trial with the participation in new acts and new incidents. In such a situation, the Trial Panel was bound not to accept the Amended Indictment relevant to the Accused Zeljaja since that part of the charges should have first been submitted to the preliminary hearing judge for confirmation.

51. According to Article 275 of CPC of BiH, if the Prosecution evaluates that the presented evidence indicates a change of the facts presented in the indictment, the Prosecution may amend the indictment. Therefore, the amendments have to be made within the scope of the facts contained in the confirmed Indictment and relevant to the specific accused person. The law does not foresee the possibility of adding new charges and/or exceeding the charges.

52. Notwithstanding that the charges under Count 3 were included in the confirmed Indictment, they were relevant to the other Accused (Bundalo and Aškraba) but they were new charges for the Accused Zeljaja. Even though the Defense for the Accused Zeljaja was given the opportunity to respond to the Amended Indictment and to propose their evidence, the charges were still exceeded.

53. Therefore, although the Accused Zeljaja was not included in Count 3 of the confirmed Indictment, the Prosecution unlawfully exceeded the charges relevant to him under this Count of the Amended Indictment. Clearly, that cannot be considered only as the amendment to the Indictment since the Prosecution may do that only for the same Accused persons and in the scope of the offenses of the same type like those contained in the confirmed Indictment which entered into force. In this specific case, the Prosecution included the Accused Neđo Zeljaja in Count 3 of the

Indictment, which by itself cannot be considered as an amendment to the Indictment, as the Defense properly and correctly argued.

54. Consequently, the Trial Panel erred when it admitted this expansion of the charges of the Indictment relevant to the Accused Neđo Zeljaja, since he could not be criminally prosecuted at this stage of the proceedings in this manner.

55. Based on the foregoing, the Appellate Panel is satisfied that the Defense is justified in appealing the Verdict on the grounds of Article 297(1)(j) of the CPC of BiH, so that the First Instance Verdict needs to be revised in this part.

56. According to Article 314(1) of the CPC of BiH, the Appellate Panel shall revise the First Instance Verdict in the case of essential violations of the criminal procedure referred to in Article 297(1)(j) of the CPC of BiH. Exceeding the charges poses an obstacle to a competent adjudication of a criminal matter and prevents the court from entering into the merits of the criminal matter. The circumstances that do not allow the court to consider the issues relevant to the existence of a criminal offense, actually pose procedural obstacles to the court to consider and competently adjudicate the criminal matter at hand. Faced with such a situation, the Court is bound to render a decision whose specific nature, contents and form make it a procedural verdict.[8]

57. The Appellate Panel opines that the legislature clearly omitted the possibility to regulate the procedural situation in which the court finds that the charges have been exceeded. The CPC of BiH provides that in case of essential violations referred to in Article 297(1)(j), the court shall revise the first instance verdict in accordance with the provisions of Article 314 of the CPC of BiH. When drafting the legal provisions, the legislator obviously had in mind the situation when the existing charges have been exceeded which would result in rendering a conviction which would not contain the pertinent portions of the account of facts. However, it is impossible to revise a verdict when charges are exceeded by adding new charges to the accused. In such a situation, the Appellate Panel must render a verdict dismissing such charges.

58. As a type of verdict in the criminal proceedings, Article 283 of the CPC of BiH foresees a verdict dismissing the charges and prescribes in its sub-paragraphs a) through e) when such a verdict may be rendered.[9] By its nature and character, the verdict dismissing the charges is a

[8] *See* para. 58 for explanation of "procedural verdict".
[9] Article 283 of the CPC of BiH: The Court shall pronounce the verdict dismissing the charges in following cases: a) if the Court is not competent to reach the verdict; b) if the Prosecutor dropped the charges between the beginning and the end of the main trial; c) if there was no necessary approval or if the competent state body revoked the approval; d) if the accused has already been convicted by a legally binding decision of the same criminal offense or has been acquitted of

technical, more precisely, procedural verdict. However, exceeding the charges has not been foreseen by the law as one of the reasons for rendering a verdict to dismiss the charges.[10]

59. A proper verdict may be rendered only on the basis of a confirmed indictment, which is considered to be a legally valid request by the Prosecution. However, with regard to the Accused Neđo Zeljaja, there is no legally valid request by the Prosecution under Section 3 (a) and (b) of the Operative Part of the First Instance Verdict, more precisely, the Indictment as to this charge did not enter into force. Given that the rights of the Accused have to be balanced with a fair trial, the Appellate Panel is satisfied that a verdict has to be rendered to dismiss the charges relevant to the Accused Zeljaja under Section 3 a) and b) of the Operative Part of the First Instance Verdict.

60. Given the legal vacuum in accordance with Article II/2 of the Constitution of Bosnia and Herzegovina[11], the Appellate Panel has applied the provisions of Article 6(1) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[12] Article 6(1) and (3) of the ECHR guarantees the right to a fair trial and gives a number of basic due process procedural rights as the minimum rights guaranteed to the accused. The accused has the right to be informed promptly (not mid- trial), in a language which he understands and in detail, of the nature and cause of the accusation against him. This rule has to be considered in the context of the criminal procedure defined under the CPC of BiH. Introducing new charges in the course of the main trial is in contravention of the principles set forth under the provisions of Article 6(3) of the

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the charges or if proceedings against him have been dismissed by a legally binding decision, provided that the decision in question is not the decision on dismissing the procedure referred to in Article 326 of this Code; e) if by an act of amnesty or pardon, the accused has been exempted from criminal prosecution or if criminal prosecution may not be undertaken due to the statute of limitation or if there are other circumstances which permanently preclude criminal prosecution.

[10] Article 283(b) of the CPC of BiH of 2003 originally provided that the Court shall pronounce the verdict dismissing the charges if the proceedings were conducted without the Prosecutor requesting so. However, under Article 86 of the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina which was published in the Official Gazette No. 58/08, Article 283, sub-paragraph b) was deleted.

[11] Constitution of Bosnia and Herzegovina, Article II. 2: International Standards: The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms: Article 6(1): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. … 3 Everyone charged with a criminal offense has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his Defense; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

ECHR (*promptly... in detail*). Despite given an opportunity to be heard by the Trial Panel, the lack of notice at the start of the proceedings prevents the Accused from intervening on his own behalf as to this charge. There are too many potential lost opportunities for challenges to a witness or evidence that could have been raised by the Accused to satisfy the minimum rights of due process.

61. The European Court of Human Rights (ECtHR) jurisprudence takes into account the entire proceedings conducted under national legislation, functioning of the laws and jurisprudence of the judicial body that decides on appeal, the powers of the parties to the proceedings and the manner of their representation and protection.[13]

62. Having in mind that exceeding the charges at the same time violates the provisions of Article 6(1) and (3) of the ECHR, the Appellate Panel has ruled to directly apply the ECHR provisions and dismiss the charges against the Accused Neđo Zeljaja as described under Section 3(a, b) of the Operative Part of the First Instance Verdict.

b. Conclusion

63. In regards to the appeal of Accused Neđo Zeljaja, in view of Article 280(1) of the CPC of BiH, the Appellate Panel finds that the Defense is justified in arguing that the charges were exceeded in Section 3 of the Operative Part of the First Instance Verdict, which gave rise to an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH.

4. Sub-Ground Four: Article 297(1)(k) of the CPC of BiH: The Defense argues that the Verdict did not provide the reasons relevant to the decisive facts

(a) The Appellate Panel did not find any essential violations under Article 297(1)(k) of the CPC of BiH in the First Instance Verdict.

64. The Defense for the Accused Bundalo and Zeljaja provide in their Appeals a number of facts and circumstances to dispute the existence of a wide-spread and systematic attack, intent, causal relation between the acts of the Accused and the criminal offense of Crimes against

[13] In its decisions, the Constitutional Court of BiH referred to the jurisprudence of the European Court of Human Rights, according to which "*the issue of whether the accused had a fair trial must be decided upon on the basis of the entire proceedings*." See: European Court of Human Rights, *Monnell and Morris*, Decision of 2 March 1987, Series A, No. 115, page 21, para 54; AP 408/07, Application by Dragoje Paunović, Decision of 11 February 2010, para 39.

Humanity, the status of the Accused and their role; they point to their alibi and a number of inconsistencies between the testimony of various witnesses. All that, according to the Defense, makes the Operative Part of the Verdict incomprehensible, internally contradictory and in contravention of the grounds of the Verdict.

65. The Appellate Panel notes that disputing the accuracy of the factual findings of the First Instance Verdict does not constitute the grounds of appeal under Article 297(1) (k) of the CPC of BiH, but under Article 299 of the CPC of BiH (Erroneously and Incompletely Established Facts). This issue will be addressed in Section IV of the Verdict.

66. Defense for both Accused argue that the Trial Panel erred in holding the Accused responsible under the Joint Criminal Enterprise mode of liability. They point out a number of deficiencies in the First Instance Verdict which stand in a causal relationship with the conclusion reached by the Trial Panel, specifically, that the existence of Joint Criminal Enterprise followed from the established and proved facts. This ground of appeal will be addressed in Section V relevant to the violations of Article 298 of the CPC of BiH.

(i) Appeal Arguments of the Accused Ratko Bundalo

67. Defense for the Accused Ratko Bundalo submits that one of the deficiencies of the First Instance Verdict is the absence of legal qualification of the offenses for every individual count and sub-count. The Defense also disputes the legal qualification and the application of JCE. When the Court decided to apply the JCE as the mode of liability, it did not provide in the Verdict the reasoning relevant to the decisive facts. According to the Defense, the Verdict (both Operative Part and the Reasoning) does not contain a sufficient account of decisive facts: identification of the participants in the JCE, the type of the JCE, agreement or understanding among the participants of the concerted action, and or the time frame of the JCE.

68. According to the Defense, the Trial Panel failed to substantiate their findings by relevant evidence in the Reasoning of the Verdict, in particular in Sections 1e), 1f) and 1g) of the Operative Part of the First Instance Verdict.

a. Findings of the Appellate Panel

69. Pursuant to Article 297(1)(k) of the CPC of BiH, the criminal procedure is essentially violated when the first instance verdict, as an official court document, contains certain

deficiencies in its operative part and reasoning, that its nature is such that it renders impossible the examination of its lawfulness and validity.

70. Having thoroughly and duly examined the disputed Verdict in terms of deficiencies that could amount to the essential violations of the criminal procedure pursuant to Article 297(1)(k) of the CPC of BiH, the Appellate Panel has found that the Verdict does not contain the deficiencies referred to in sub-paragraph k), as it is argued in the Appeals. Nevertheless, the Appellate Panel holds that the Defense arguments are partially grounded, however the deficiencies of the first instance Verdict do not amount to the essential violations of the criminal procedure, but they violate the substantive law. The Appellate Panel will elaborate on that issue in Section V of the Reasoning.

71. The Account of Facts in the predominant part of the Operative Part is clear, precise and comprehensive, it contains facts and circumstances that constitute the elements of the criminal offense of which the Accused were found guilty (Crimes against Humanity by way of persecution in violation of Article 172 of the CPC of BiH). The Appellate Panel holds that the description of the offense and the participation of the Accused Bundalo and Zeljaja in particular Sections of the First Instance Verdict's Operative Part is clear and comprehensive, but the mode of participation of the Accused in the offense does not contain all the required elements to be defined as a joint criminal enterprise. Therefore, the Appellate Panel properly applied the law and reversed the First Instance Verdict by qualifying the participation of the Accused in accordance with Article 29 of the CC of BiH.

72. With respect to the Sections of the First Instance Verdict that constitute the convicting part of the Second Instance Verdict's Operative Part, the Appellate Panel finds that the factual account of the offense is complete and correct (Sections 1a, 1c, 1d, 1i, 1j, 1k, 1l in relation to both Accused; Sections 1b, 1h, Section 2 – in relation to the Accused Zeljaja, and Section 3 in relation to the Accused Bundalo).

73. The previously cited Sections of the First Instance Verdict's Operative Part specify the place and time of the perpetration of the criminal offense and the actions of the Accused. The Operative Part of the Verdict contains all essential elements of the criminal offense referred to in Article 172 of the CC of BiH and gives precise description of the individual acts of perpetration referred to in all Sections of the Operative Part.

74. All the presented evidence was listed in the Reasoning of the Verdict, including its content and the evaluation of its credibility. The disputed Verdict provides the reasoning as to the decisive facts relevant for adjudicating the criminal matter, it gives a detailed and exhaustive

evaluation of the entire evidence, both individually and collectivelly. The Trial Panel explained in detail every Section of the Operative Part of the Verdict and provided reasons which guided the Trial Panel to render such decision. The disputed Verdict contains the reasoning relevant to the decisive facts and points to the evidence on which the Trial Panel relied when making the decision.

75. Nevertheless, the Defense is justified in arguing that the JCE was not properly explained in the Operative Part of the Verdict and/or that the Trial Panel incorrectly applied JCE as the appropriate mode of liability. The Appellate Panel finds that this omission by the Trial Panel does not make the Verdict deficient in terms of Article 297(1)(k) of the CPC of BiH, since the participation of the Accused and their individual responsibility were properly defined, they were held accountable as accomplices pursuant to Article 29 of the CC of BiH. The Appellate Panel has therefore revised the disputed Verdict by removing JCE as the appropriate mode of liability from the Operative Part and the Account of Facts, which results in acquitting the Accused of this charge. In this manner, the Appellate Panel has remedied the deficiencies and inconsistencies of the First Instance Verdict.

(b) Conclusion

76. The Appellate Panel holds there are no essential violations under Article 297(1)(k) of the CPC of BiH in the First Instance Verdict.

5. Sub-Ground Five: Article 297(2) of the CPC of BiH: The Defense argues that the Court incorrectly applied some CPC provisions and this affected the rendering of a lawful and proper verdict

(a) The Appellate Panel finds that the Trial Panel correctly applied the CPC provisions and,made no essential violations under Article 297(2) of the CPC of BiH.

77. The essential violation (the so called relatively essential violation)[14] of the criminal procedure under Article 297(2) of the CPC of BiH occurs when the Court has not applied or has improperly applied some provisions of this Code or during the main trial or in rendering the verdict and this affected or could have affected the rendering of a lawful and proper verdict.

[14] "Relative essential violation" means an essential violation that does not require a mandatory revocation under Article 297(2) of the CPC of BiH.

78. When a verdict is disputed on the grounds of relatively essential violations of the criminal procedure, the appeal has to indicate not only the acts and omissions which resulted in the omission or improper application of the relevant procedural law provisions, but it also has to explain how and why they affected or could have affected the rendering of a lawful and proper verdict. Otherwise, examining whether a relatively essential violation was made or not would become an *ex officio* review.[15]

(i) Appeal Arguments of the Accused Ratko Bundalo

79. The Defense for the Accused Ratko Bundalo claims that the Trial Panel violated Article 280 of the CPC of BiH by exceeding the charges and finding the accused guilty of War Crimes against Prisoners of War in violation of Article 175(1)(b) of the CC of BiH. The Defense further argues that exceeding the charges resulted in the violation of Article 297(1)(d) and paragraph 2) of the CPC of BiH.

a. Findings of the Appellate Panel

80. The Appellate Panel holds that the Defense Appeal on this ground is partially justified, but contrary to the Defense arguments, this violation did not decisively affect the first instance Verdict. The Appellate Panel finds that the Trial Panel incorrectly defined the criminal offense of Crimes against Humanity in connection with War Crimes against Prisoners of War in violation of Article 175(1)(b) of the CC of BiH. This Panel will state its position on this issue in Section V (application of the substantive law). The incorrect legal qualification did not violate the right to Defense, as the Defense wrongly submits.

(ii) Appeal Arguments of the Accused Bundalo and Zeljaja

81. During the proceedings, the Defense for both Accused presented evidence wanting to prove an alibi. However, since the Trial Panel did not accept either alibi, the Defense argues that right to Defense was violated by breaching the *in dubio pro reo* principle.

82. In addition, the Defense for both Accused submit that the Trial Panel acted in contravention of this principle when they decided about other facts which were to be proved in this case. The

[15] *See* Commentary on the CPCs in BiH, page 776 in BSC version.

Defense proceeds by arguing that the Trial Panel did not examine and determine with equal attention the exculpatory and inculpatory facts. The Defense primarily highlights the testimony of witness H and opposes the manner the Trial Panel evaluated this testimony. According to the Defense, the provisions of Articles 14 and 15 of the CPC of BiH were violated, which also resulted in violation of Article 297(2) of the CPC of BiH. As explained below, the Appellate Panel will address these matters in more detail in Section IV of the Verdict (Erroneously and Incompletely Established State of Facts)

a. Findings of the Appellate Panel

i. Alleged Violation of Article 3 of the CPC of BiH: Presumption of Innocence and *in dubio pro reo*

83. Presumption of innocence[16] is defined in accordance with international documents and it prescribes that a person shall be considered innocent of a crime until his/her guilt has been established by a final verdict.[17] The adoption of this principle relieves the accused of any burden to prove his innocence and he has the privilege against self-incrimination. Presumption of innocence does not apply only to the finding on guilt, but also to all other elements which are related with the notion of the criminal offense (act of perpetration, unlawfulness or punishability).

84. *In dubio pro reo* principle is one of the direct consequences of the presumption of innocence, and the law expressly provides that when there is a doubt, the decision has to be in favour of the accused.[18] Any doubt about the existence of a legally relevant fact shall be interpreted in favour of the accused. The facts detrimental to the accused (*in peius*) must be established with certainty and if there is any doubt surrounding these facts, they cannot be considered as established or proved. The facts in favour of the accused shall be considered established even if they are only probable and/or if their existence is doubted. This principle stems from the presumption of innocence.

85. The Appellate Panel is satisfied that the Trial Panel evaluated every piece of evidence individually and its correlation with other evidence and on the basis of such evaluation, they reached conclusions about the existence of legally relevant facts. From the legal point of view, the

[16] The so called provisional presumption is valid until proved otherwise.
[17] Article 3 Presumption of innocence and *in dubio pro reo*: (1) A person shall be considered innocent of a crime until his/her guilt has been established by a final verdict.
[18] Article 3(2) of the CPC of BiH: A doubt with respect to the existence of facts constituting elements of a criminal offense or on which the application of certain provisions of criminal legislation depends shall be decided by the Court verdict in the manner more favorable for the accused.

Trial Panel entirely complied with Article 15 of the CPC of BiH [19] and Article 281(2) of the CPC of BiH.[20] Nevertheless, the Appellate Panel finds that the application of the *in dubio pro reo* principle has to be examined within the claim of the Defense Appeals that the state of facts was not properly and completely established and in the context of the probative value of the presented evidence. The Appellate Panel will address this matter in more detail in Section IV of the Verdict (Erroneously and Incompletely Established State of Facts).

ii. Alleged Violation of Article 14 of the CPC of BiH - Equality of Arms

86. Article 14 of the CPC of BiH prescribes that the Prosecution and other parties to the proceedings are bound to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.[21] Therefore, when both types of facts are examined, both exculpatory[22] and inculpatory[23], the standard of 'equal attention' has to be applied. The facts that are subject to evaluation and establishing must be relevant to the criminal proceedings.

87. Having reviewed the disputed Verdict within the arguments of the Appeal, the Appellate Panel is satisfied that the Trial Panel fulfilled its legal obligation during the criminal proceedings prior to rendering of the Verdict by evaluating and finding the facts surrounding the legal elements of the criminal offense, criminal liability of the Accused, finding appropriate factors for criminal sanction and other facts relevant to the application of the pertinent legal provisions.

88. That the Trial Panel found facts detrimental to the Accused which imply that the charges were proved, cannot in itself be taken to mean that the parties to the proceedings were not treated equally.

[19] Article 15 of the CPC of BiH: Free evaluation of evidence: The right of the Court, Prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules.
[20] Article 281(2) of the BiH CPC: The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.
[21] Article 14 Equality of Arms: (1) The Court shall treat the parties and the Defense attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial. (2) The Court, the Prosecutor and other bodies participating in the proceedings are bound to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.
[22] To free from blame and accusation. Black's Law Dictionary.
[23] To accuse. to implicate (oneself or another) in a crime or other wrongdoing. Black's Law Dictionary

iii. Alleged Violation of Article 15 of the CPC of BiH: Free Evaluation of Evidence

89. When evaluating the existence or non-existence of facts, the Court shall not be bound or limited by formal evidentiary rules. Free evaluation of evidence is free of legal rules which would *a priori* determine the value of certain evidence. The value of evidence is not pre-determined, either in terms of quantity or quality. The evaluation of evidence includes both rational and psychological assessment, but even though there are no legal or formal rules of evaluation, evidence must still be evaluated for its credibility and probative value.

90. The Appellate Panel is satisfied that the Trial Panel evaluated every individual piece of evidence and its correlation with other evidence in the First Instance Verdict, as the Court was bound to do in line with the principle of free evaluation of evidence. Contrary to the arguments of the Appeal, the Trial Panel explained how they evaluated every individual piece of evidence - they first named every piece of evidence, then presented its content (the relevant portion of the evidence) and after that reasoned its probative value based on credibility, authenticity and relevance and tied the evidence to the conclusions of the Court and the elements of the criminal offense. The Appellate Panel finds that the Trial Panel entirely followed the process of free evaluation of evidence, precisely as it is defined under the CPC of BiH. Therefore, the provisions of Article 297(2) of the CPC of BiH were not violated. Section IV of the Verdict will examine the established state of facts within the arguments of the Appeal and verify if the Trial Panel could have properly found the facts it determined on the basis of the specific piece of evidence.

91. The Appellate Panel therefore is satisfied that the appeals raised are not justified in claiming that the main principles of the criminal procedure were violated, that is, the provisions of Articles 3, 14 and 15 of the CPC of BiH. During the main trial, the Trial Panel did not essentially violate the criminal procedure within the meaning of Article 297(2) of the CPC of BiH, nor does the disputed Verdict contain the deficiencies of such nature. To that end, the Appellate Panel has dismissed as unfounded the arguments of the Appeals filed by the Defense for the Accused Bundalo and Zeljaja as to section 297(2) of the CPC of BiH.

(b) Conclusion

92. The Appeallate Panel finds that the Trial Panel correctly applied the CPC provisions and did not essentially violate criminal procedure provisions under Article 297(2) of the CPC of BiH.

C. PROSECUTION APPEALS REGARDING ĐORĐISLAV AŠKRABA

1. Sub-Ground One: Trial Panel did not entirely resolve the charge against Đorđislav Aškraba

(a) The Appellate Panel finds that the contents of the charge have been resolved entirely in relation to the Accused Đorđislav Aškraba.

(i) Appeal Arguments of the Prosecution

93. The Prosecution submitted that the Trial Panel did not entirely resolve the contents of the charge in relation to the Accused Đorđislav Aškraba, which constituted an essential violation of the provisions of criminal procedure under Article 297(1)(h) and (k) of the CPC of BiH. In taking this position, the Prosecution relied on the Trial Panel's finding that the acts of the Accused in relation to his participation in the JCE were not specified in the Indictment.

i. Findings of the Appellate Panel

94. There is an essential violation of the provisions of criminal procedure if in its verdict the Court did not entirely resolve the contents of the charge. The Court is bound by law to resolve the contents of the charge in their entirety, meaning that the Court's verdict must include all the accused persons and all the offenses referred to in the confirmed indictment or in the indictment amended during the main trial. The contents of the charge can be resolved solely in the verdict's operative part, which is assessed based on an objective criterion by simply comparing the factual accounts of all offenses referred to in the filed indictment or the indictment amended at the main trial to those in the verdict delivered. Application of this objective criterion is entirely understandable because only the matter set out in the operative part of the verdict is adjudicated and the only binding part.

95. Bearing in mind the said objective criterion, the Appellate Panel finds that the Prosecution's reference to a violation of Article 297(1)(h) of the CPC of BiH is void of grounds. A review of the wording of the Amended Indictment and the First Instance Verdict's operative part undoubtedly shows that the contents of the charge have been resolved entirely in relation to the Accused Đorđislav Aškraba. It ensues from the First Instance Verdict's operative part that the

Accused Aškraba was acquitted of charges under Count 3 (a, b, c, d, e, f, g) in application of Article 284(1)(c) of the CPC of BiH (if it is not proved that the accused committed the offense with which he is charged).

96. The Prosecution does not offer sufficient reasons to claim the charges have not been resolved in their entirety. However, arguments that have been raised by the Prosecution could have more merit in terms of proper application of the substantive law. If, for example, the Trial Panel properly applied provisions of the CC of BiH stipulating the manner of participation of the accused in the perpetration of an offense to the described account of facts. This issue will not be addressed. In light of the finding below that the Prosecution's contention of a violation of Article 297(1)(k) of the CPC of BiH in relation to the Accused Aškraba is well-founded, the Appellate Panel will not engage in further examination or analysis of the First Instance Verdict in relation to other grounds of appeal and the Accused Aškraba.

(b) Conclusion

97. The Appellate Panel finds that the contents of the charge have been resolved entirely in relation to the Accused Đorđislav Aškraba.

2. Sub-Ground Two: Article 297(1)(k) of the CPC of BiH: The Prosecution argues that the Verdict does not cite reasons concerning decisive facts

(a) The Appellate Panel finds the Prosecution's appeal arguments well-founded regarding the existence of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH in relation to the Accused Đorđislav Aškraba. Having granted the Prosecution appeal in part, the Appellate Panel revokes the First Instance Verdict in the part pertaining to the acquittal of the Third Accused of charges under Count 3 and its sub-counts.

(i) Appeal Arguments of the Prosecution

98. The Prosecution pointed to a series of important facts and circumstances with respect to which he believes that the First Instance Verdict does not cite reasons concerning decisive facts referred to in Count 3 of the Indictment. In the Prosecution's view, the First Instance Verdict does not contain adequate reasoning on the issue of facts and evidence used to prove the Accused

Aškraba's criminal liability. In his appeal the Prosecution indicated specific evidence and portions of witness testimony that, in his view, were not properly evaluated; as a result, the challenged Verdict does not reason certain important facts.

a. Findings of the Appellate Panel

99. The Appellate Panel finds that the Prosecution's contention that the First Instance Verdict does not contain reasons concerning decisive facts referred to in Count 3 of the Indictment is well founded. Specifically, an essential violation of the provisions of the criminal procedure occurs if in its reasoning the Court adduces insufficient or unconvincing reasons. In that case, there is an essential violation of criminal procedure provisions on the insufficient or inadequate reasoning concerning decisive facts. The Trial Panel, as correctly indicated by the Prosecution, failed to sufficiently explain the reasons for not finding the Accused responsible for the crimes that occurred in the camp in which he performed the duty of the Guards Commander. Based on the found facts the question is could a reasonable trier of fact conclude as did the Trial Panel. Without adequate reasoning the Appellate Panel cannot evaluate this claim.

100. The Prosecution rightly points to the presented evidence, primarily witnesses (Fejzija Hadžić, Slavko Macan, Witness "A", Witness "I", Manojlo Krstović)[24] whose testimonies call into doubt the Trial Panel's finding on the issue of whether Đorđislav Aškraba knew or had reason to know that the prisoners were taken out of the camp for some reason other than the exchange. The cited evidence suggests that the persons who issued orders knew where the prisoners were taken to, and that the guards knew that as well. This evidence therefore call into question the reasonableness of the Trial Panel's finding.

101. Moreover, the Prosecution points to specific evidence calling into question the Trial Panel's finding regarding the Accused's alibi (that he was not at the *Gunpowder Warehouse (Barutni magacin)* on 5 August 1992). The First Instance Verdict failed to analyze the evidence invoked by the Prosecution to eliminate the possibility of accepting the alibi. Among other things, the Trial Panel failed to analyze the testimonies of witnesses Manojlo Krstović and protected witness "I" individually (as a whole) and in their mutual correlation.

102. Based on the foregoing, the Appellate Panel finds that the challenged Verdict does not contain sufficient reasons in relation to the criminal liability of the Accused or his accepted alibi.

Due to the lack of reasons concerning the decisive facts, it is not possible to examine the validity and lawfulness of the Trial Panel's decision. Having determined the existence of an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH, the Appellate Panel is bound by Article 315(1)(a) of the CPC of BiH to revoke the relevant part of the First Instance Verdict and order a retrial before the Appellate Division where the evidence presented in relation to the circumstances under Count 3 of the Indictment will be presented again and additional evidence presented if needed.

103. Pursuant to the statutory obligation under Article 316 of the CPC of BiH, the Appellate Panel, having revoked the First Instance Verdict in part, only briefly cites reasons for the revocation.[25]

(b) Conclusion

104. The Appellate Panel finds that the Prosecution's appeal arguments well-founded regarding the existence of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH in relation to the Accused Đorđislav Aškraba. Having granted the Prosecution appeal in part, the Appellate Panel revoked the First Instance Verdict in the part pertaining to the acquittal of the Third Accused of charges under Count 3 and its sub-counts.

[24] Witness "I": see p. 100 of the transcript: the witness was present when different soldiers took prisoners away in early August 1992; they were tied and blindfolded in the compound and taken to extract the dead and the wounded.
[25] Article 316 of the CPC of BiH: In the opinion of the verdict, in the part by which the first instance verdict is revoked or in the decision on revoking the first instance verdict, only brief reasons for revoking shall be cited.

IV. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF REVIEW

105. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.

106. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

107. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

108. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous".

109. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.[26] However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

1. Sub-Ground One: Accused Ratko Bundalo's Alibi

(a) The Appellate Panel finds that the facts in the First Instance Verdict were correctly and completely established by the Trial Panel and did not violate Article 299 of the CPC of BiH.

(i) Appeal Arguments of the Accused Ratko Bundalo

110. The Defense points out that the facts have been established erroneously, noting that no paragraph of the Verdict pertaining to the events of August 1992 can be linked to the Accused Bundalo because at that time he was either absent from Kalinovik or was incapacitated to give orders because of illness. The Defense refers to testimonies of witnesses Anina Bundalo Dimitrijević, Gordana Kikić, Mirsad Handanović, Dr. Mirko Ćerović, Ćetko Sladoje, protected witnesses "S1" and "S4", Risto Puhalo, Witness "H" and Rade Pavlović. In the view of the Defense, it ensues from the presented evidence that the alibi has been proven, while the Trial Panel established the facts erroneously, thus violating the principle *in dubio pro reo*.

a. Findings of the Appellate Panel

111. In the view of the Appellate Panel, this ground of appeal is void of any merit for the following reasons. Contrary to the arguments of the appeal, the Trial Panel provided a detailed and comprehensive explanation concerning the reasons for rejecting the Accused's alibi. The Trial Panel's finding on the non-acceptance of the alibi – namely, the finding that the Accused left Kalinovik on 7 August 1992 – is fully accepted by the Appellate Panel.

112. The Trial Panel noted in the Verdict that witnesses Anina Bundalo, Gordana Kikić, Dr. Ćerović, "S4" and Risto Puhalo – relied upon by the Defense – were consistent in claiming that the Accused was in Belgrade already on 3 August 1992. However, the Trial Panel had compelling reasons not to accept the referenced testimonies as credible. Having assessed all the presented evidence in their correlation, the Trial Panel was correct in finding that these witnesses, because of their close relationship with the Accused, gave their testimonies with a view to diminishing or eliminating his criminal liability.

[26] *M.Š.*, AP-661/04 (Const. Ct. of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

113. The Trial Panel assessed the testimonies of the witnesses together with the other presented evidence. The testimonies of these witnesses contradict the documentary evidence presented at the main trial to begin with. The Trial Panel accepted the following evidence as credible: Report by the Kalinovik Health Center with an infirmary no. 562/92 of 28 August 1992, Letter from the Kalinovik Health Center no. 01-33/08 of 8 April 2008, records of the Kalinovik Health Center for the period between 24 July and 7 September 1992, and Letter from the Military Medical Academy in Belgrade (VMA) of 5 October 2007. It ensues from the cited documents that the Accused was referred to Belgrade on 7 August 1992, whereas the letter from the VMA suggests that the Accused did not receive treatment at the VMA in the period between 1 April and 31 December 1992 but in the course of 2004. The Trial Panel also assessed documentary evidence[27] wherefrom it ensues that Svetozar Pareżanin signed the dispatch notes in the period between 6 August 1992 and 17 August 1992, suggesting a conclusion that the Accused Bundalo was absent during that time period.

114. In addition to the documentary evidence, the Trial Panel analyzed in detail the witness testimonies, accepting the respective testimonies of witnesses "H", Risto Puhalo and Milan Lalović in the part where they state that they went with Ratko Bundalo to Belgrade in August. The Trial Panel provided a detailed account of the discrepancies in the testimonies in relation to the issue of whether or not Witness Milan Lalović accompanied them to Belgrade. Furthermore, contrary to the averments in the appeal, the Trial Panel was right in accepting the testimony of Witness "H" who stated during the redirect examination that 7 August 1992 could have been the date of their trip to Belgrade, whereas Witness Milan Lalović said that they set out on their trip five to six days following the fall of Rogoj.[28]

115. Based on the foregoing, the Appellate Panel finds that the First Instance Verdict contains a detailed and comprehensive analysis of documentary evidence and testimony of alibi witnesses, making a reasonable finding to reject the alibi, and this Panel accepts that finding in its entirety. The arguments in the Defense appeals do not call into doubt the correctness of the Trial Panel's factual

[27] O-I -13 a - Kalinovik TG *strictly confidential* no 11/3 of 6 August 1992 sent to the Herzegovina Corps Command /for Foča TG/ signed by Colonel Svetozar Pareżanin, Chief of Staff; O-I -13 b - Kalinovik TG Command, military secret, *strictly conf.* no 13/3 of 10 August 1992 sent to the Main Staff of the SR BiH Army, for information to Herzegovina Corps, signed by Colonel Svetozar Pareżanin; O-I -13 c - Kalinovik OG Command, *strictly conf.* no. 142-4 of 15 August 1992 sent to the Herzegovina Corps Command, signed by Colonel Svetozar Pareżanin, Chief of Staff; O-I -14 – Herzegovina Corps Command *strictly conf.* no. 147-369 of 2 August 1992, sent to the Main Staff of the SR BiH Army, signed by the Commander Colonel Svetozar Pareżanin; O-I -15 – Serbian Republic of Bosnia and Herzegovina, Trebinje Municipal Assembly, Trebinje Reporting Centre, dated 4 August 1992, Regular Combat Report signed by Commander Colonel Marko Kovač; O-I -16 Kalinovik TG Command *strictly conf.* no. 142-2 of 15 August 1992 signed by Colonel Svetozar Pareżanin; O-I -17 Podrinje OG Command *strictly conf.* no. 142-5 of 17 August 1992 sent to the Herzegovina Corps Command, signed by Colonel Svetozar Pareżanin.

[28] Rogoj fell on 31 July 1992 (*See Bundalo* First Instance Verdict).

finding in relation to the date (7 August 1992) when the Accused Ratko Bundalo went from Kalinovik to Belgrade.

2. Sub-Ground Two: The Appellant was not the Chief Commander of All Units in the Kalinovik Territory

(i) Appeal Arguments of the Counsel for the Accused Ratko Bundalo

116. The Defense for the Accused Ratko Bundalo submits that the Trial Panel erroneously established the fact that the Appellant was the Chief Commander of all units in the Kalinovik territory. The Defense particularly submits that the TG was an *ad hoc* organized group established as a result of the events related to the combats around Trnovo in early June 1992. It was comprised of two smaller tactical groups and a tactical unit Mixed Anti-Armor Artillery Regiment (MAAAR) that was, in fact, under the command of the Accused Bundalo. Furthermore, the Defense submits that it was not part of any permanent military structure, and that the Appellant did not perform the duty of a commander.

117. In support of their assertion, the Defense specifically relied on the testimonies of expert witnesses Colonel Jovo Lalović and Rade Pavlović to which the Defense referred in their submission. In addition, the Defense also presented a report by Colonel Kovač from Foča dated 4 August 1992.

118. The Defense submits that contrary to a number of documents among the evidence containing the Appellant's signature "with the indication of the TG commander", the Defense submitted far more pieces of evidence and witness testimonies showing that the Appellant was not the TG Commander. The Defense further submits that commanding over a TG does not imply commanding over all units present in one territory or responsibility for the situation in the certain area.

a. Findings of the Appellate Panel

119. During the first instance proceedings, the Defense also contested the capacity and role of the Accused. The Trial Panel did not accept the assertions of the Defense that at the critical period of time, the Accused Bundalo was exclusively the Commander of the 13th MAAAR and had no other formation duties and tasks in Kalinovik. The Appellate Panel upholds in its entirety the Trial

Panel's conclusion and finds that by its appeal arguments and interpretation of the evidence adduced, the Defense did not cast doubt on the correctly and completely established state of facts with regard to the role, capacity and function of the Accused Bundalo.

120. According to the Appellate Panel, the Trial Panel found with certainty based on the adduced documentary evidence and testimony of a number of witnesses that during the relevant period of time, the Accused Bundalo performed the duty of the Commander of the TG Kalinovik, whose zone of responsibility included the areas of Kalinovik and Trnovo, and also a part of the Municipality Konjic.

121. The Trial Panel accepted from the evidence adduced that the Yugoslav Army still kept the Accused in its records as a Commander of 13th MAAR of the 13th Corps. However, the Trial Panel correctly concluded from all the evidence adduced that at the critical time, the Accused was in the Kalinovik Garrison, that he was a member of the Army of Republika Srpska and that he was a Commander of the Tactical Group Kalinovik. The First Instance Verdict stated in detail the contents of the adduced evidence, which was correctly evaluated individually and collectively in its mutual correlation. The Trial Panel evaluated and accepted the Findings and Opinion of a military analyst, Prof. Dr. Ratko Radinović, based on which it explained in detail the sequence of changes in the organizational and territorial terms after the units of the Rijeka Corps, in which the Accused was a member had been relocated to Kalinovik. The Trial Panel correctly accepted the Findings and Opinion of this expert witness as objective and professional, and consistent with testimonies of the witnesses heard and the documentary evidence admitted into the case file. Based on the testimony of expert witness, Prof. Dr. Radinović, the Trial Panel concluded that the 13th MAAAR did not exist at the relevant period time, but that the technical equipment, staff and commanding officers were primarily re-assigned to the TG Kalinovik which was within the zone of responsibility of the Herzegovina Corps. The Trial Panel based its factual findings also on the testimony of witness Božo Purković, witness H, and abundant documentary evidence, starting from the oldest document on the existence of the TG Kalinovik dated 21 May 1992[29] through the last document dated 19 March 1993.[30]

122. Bearing in mind the abovementioned, based on the evidence adduced (which is listed in detail in the First Instance Verdict)[31] as well as on the testimonies of the witnesses who consistently stated that at the relevant period of time the Accused Ratko Bundalo was the Commander of the TG

[29] TG Kalinovik Combat Report Str.Conf. No. 13/23 dated 21 May 1992.
[30] O3-16 order by which Colonel Ratko Bundalo issued on 19 March 1993 an order to exchange the prisoner FWS -130 and hand him over to the VII Batallion of the TG Foča.

Kalinovik, the Trial Panel correctly concluded that the Accused performed the duty of the Commander of the TG Kalinovik, whose zone of responsibility included the areas of Kalinovik Trnovo, as well as a part of the Konjic Municipality.

123. Contrary to the arguments of the appeal, the Trial Panel did not arbitrarily or incompletely explain the conclusions on the relevant facts being proved by referring to "a number of evidence". The contested Verdict contains a comprehensive analysis of the adduced evidence, pointing to the relevant portion of the contents of the particular and specific piece of evidence (documentary evidence or witnesses). The Appellate Panel finds that by the proper evaluation of the evidence adduced, the Trial Panel completely and correctly established the facts in relation to Bundalo's role and his capacity of the Commander of the TG Kalinovik. By its appeal arguments the Defense failed to cast doubt on the correctness of the factual findings of the Trial Panel in this part.

3. Sub-Ground Three: Incorrect establishment of decisive facts about the responsibility of Ratko Bundalo

124. The Defense for both Accused contest the findings of facts in the contested Verdict by challenging the credibility of the testimony of witness "H" and witness Rade Pavlović. The basis used by the Defense to contest these testimonies is the fact that these two witnesses participated in the critical events within the scope of the functions that they held at the time.

125. The Appellate Panel analyzed with due diligence the testimony of these witnesses and based on this, reviewed the state of facts found in the contested Verdict. According to the Appellate Panel, the evidence in the case at hand does not point to the existence of suspicion that these two witnesses testified falsely in order to avoid their personal responsibility and at the same time incriminate the Accused Bundalo and Zeljaja.

126. The state of facts was not found exclusively based on the testimony of these witnesses but also based on the scrutiny and evaluation of all evidence adduced. The testimony of these witnesses is consistent and balanced with the evidence adduced. It is further corroborated with the testimony of the victims of the criminal acts charged against the Accused. It is correct that in certain parts of their testimony, these witnesses were the only persons who witnessed orders being issued (*e.g*. the Accused Bundalo told witness Rade Pavlović to take the men from Kalinovik to Bileća). However, their testimonies evaluated in their entirety, mutually and in relation to the testimony of the

[31] *Bundalo et al* First Instance Verdict, pgs. 73-77 (BCS version).

aggrieved parties, are entirely consistent. The testimonies of the aggrieved parties and the documentary evidence constitute corroborative evidence which the Trial Panel used to test the credibility of these witnesses.

127. The Appellate Panel finds that the appeal arguments challenging of the credibility of these witnesses are ungrounded and that no reasons were given that would cast doubt on the state of facts found on this basis.

128. One should not disregard the fact that these witnesses also testified directly about their own personal participation in the events and did not deny their involvement. Their possible liability is not the subject matter of these proceedings and the Appellate Panel makes no findings regarding this issue.

(i) Appeal Arguments of the Accused Ratko Bundalo

129. The Defense contests the factual findings from this Section. The Defense submits that witness Pavlović and witness ”A”, as direct participants in the arrest and transportation of the detained Bosniaks from Jeleč to the Elementary School in Kalinovik, and subsequently to Bileća and Foča, tried to diminish their responsibility and impute it to the Accused Bundalo. The Defense submits that the victims of the described incidents do not incriminate the Accused.

(ii) Appeal Arguments of the Accused Neđo Zeljaja

130. The Defense contests the existence of an attack on the civilian population. The Defense submits that different conclusions ensue from the adduced Prosecution evidence about the role of the Accused at the crime scene. The Defense also submits that the transportation and detention of men (in Bileća, and subsequently in Foča) were not the responsibility of the police, but exclusively of the military.

a. Findings of the Appellate Panel

131. The Appellate Panel holds the state of facts in relation to Section 1 a) is correctly and completely established. The Trial Panel evaluated in a comprehensive and accurate manner the testimony of the military and police witnesses who participated in the event and those who were the

victims of the critical event.

132. In their appeals, the Defense for the Accused interpret arbitrarily the evidence adduced, pointing only to certain portions of the evidence which, in their opinion, goes in favor of the Defense. The Defense for the Accused Bundalo submits that the police participated in the critical event, while the Defense for the Accused Zeljaja imputes this responsibility to the army. Such manner of the evidence evaluation by the Defense is selective and does not cast doubt on the factual findings of the contested Verdict.

133. The participation of the army, the civilian and the military police in the incriminating incident ensues from the testimony of witness ”A”, witnesses Rade Pavlović and Danilo Đorem. The participation of the Accused Bundalo directly ensues from the testimony of witness “A” and witness Rade Pavlović. As the Trial Panel indicated, Witness Pavlović confirmed that Bundalo told him to take the men from the school in Kalinovik, and that these men were transported to Bileća. Witness “A” escorted the Bosniak men from Jeleč when they were transported to Foča.

134. The First Instance Verdict contains detailed reasoning and refers to portions of testimony of these witnesses based on which it establishes the state of facts. The Defense does not contest the credibility of the testimony of these witnesses. The Appellate Panel does not accept the Defense view that the testimony of these witnesses is a result of their evasion of their own responsibility for the critical events. The fact that these two witnesses participated in the event at issue does not necessarily mean that they are trying to present the incident incorrectly in order to avoid their own potential responsibility. Furthermore, it is noted that the testimony of these witnesses are consistent with the testimony of the witnesses who are direct victims of the incident (Asim Zametica, Ahmo Mušanović, Merima Jašarević, Mevlida Čustović, witness “X“). Their testimonies support and corroborate each other. Taken together this constitutes significant corroroborative evidence. The witnesses heard, each of them from his/her own perspective and within the limits of his/her perception, factually described the incident referenced in Section 1 a) of the Operative Part of the First Instance Verdict. The consistency of the testimonies and their consistency with the testimony of the victims point to a conclusion that there is no ground for suspicion into the credibility of the testimony of witness “A” and witness Rade Pavlović. In their appeal, the Defense does not indicate either the specific facts or the circumstances that might constitute grounds for suspicion. Rather, the Defense selectively and arbitrarily evaluates the testimony of these witnesses, and based on their personal participation in the event, develops a presumption of incorrect testimony, with no footing in the evidence adduced.

135. The Defense also contests without grounds the intervention of the Trial Panel by which the factual description in Section 1 a) and 1 b) is merged into Section 1 a) of the Operative Part of the First Instance Verdict. The Trial Panel made a permissible intervention in order to better organize the factual description contained in the Operative Part of the First Instance Verdict. This intervention had no impact on the established state of facts. The time determinant in Count 1 a) of the amended Indictment was strictly indicated (*at the beginning of May 1992*), while Count 1 b), even though it does not contain an explicit indication of time, factually describes the continuation of the event referenced in Count 1 a), that is, it follows the event referenced in Count 1 a) of the amended Indictment.

136. Furthermore, the Appellate Panel concludes that the Trial Panel properly found the facts concerning the participation of the Accused Neđo Zeljaja. The presence of the Accused near the inn in Jažići, when the Bosniaks from Jeleč were captured, where he ordered the captured Bosniaks to be bussed to the school ensued from the testimony of the witnesses. It also ensues from the testimony of the witnesses that the Accused interrogated them on the premises of the PSS Kalinovik.[32], The Defense arguments do not cast doubt on the correctness of the state of facts found in the contested Verdict on this issue.

137. The Defense also contests the fact that there existed an attack on the civilian population. This argument has absolutely no merit. Furthermore the argument that the war necessitated a two-way movement of the population, and therefore there was no expulsion is not a credible defense. Such ideas and theories of the Defense have no footing in the evidence adduced. The Defense cannot develop its case by pointing to fragments of the evidentiary materials.[33] The witnesses testified consistently with regard to the existence of an attack on the civilian population. The Trial Panel relied on witnesses who were members of the police or the military[34], and witness-victims of the critical event.[35] The witnesses described in detail the development of the entire event. In this respect, no other conclusion can be inferred based on their testimonies except the one reached by the Trial Panel.

138. Bearing in mind the abovementioned, the Appellate Panel finds that the state of facts was established completely and correctly in relation to Section 1 a) of the Operative Part of the First Instance Verdict.

[32] Ahmo Mušanović, Asim Zametica, and Witness X.
[33] Defense Witness Nedžib Muhović and Expert Witness Radinović.
[34] Rade Pavlović, Witness A, and Danilo Đorem.
[35] Ahmo Mušanović, Asim Zanetica, Witness X, Memna Jašarević, Mevlida Čustović, Aziz Đozo, and Fejzija Hadžić.

(iii) The Appeal Arguments of the Accused Bundalo in Relation to Sections 1 c), 1 d), 1 i) and 1 k) of the Operative Part of the First Instance Verdict

139. The Defense for the Accused contests the state of facts found in Sections 1 c), 1 d), 1 i) and 1 k) of the Operative Part of the First Instance Verdict.

140. In relation to Section 1 c), the Defense contests the state of facts by referring to the portion of the testimony of witness "H" and points to the responsibility of witness Rade Pavlović.

141. In relation to Section 1 d), the Defense points to the liability of witness Rade Pavlović and refers to the Findings of expert witness Mladen Prole.

142. In relation to Section 1 j), the Defense submits that this is an already adjudicated legal matter.

143. In relation to Section 1 i), the Defense contests any form of liability of the Accused Bundalo and indicates that the key evidence is the testimony of witness Huso Tukelija for which the liability of these crimes are not the Accused Bundalo, but that of Boško Govedarica and the police.

144. In relation to Section 1 k), the Defense contests the finding that the Accused Bundalo issued the order and further contests the testimony of witness "A" regarding the finding that Gojko Starčević (deputy of Rade Pavlović) passed on the order of Ratko Bundalo.

145. In relation to Section 1 l), the Defense contests the state of facts by pointing to the liability of witness Pavlović. The Defense submits that being aware of his own liability, this witness imputes liability to the Accused Bundalo.

a. Findings of the Appellate Panel

146. The Appellate Panel holds the Defense failed to point to any ground sufficient to cast doubt on the correctness of the state of facts found in the First Instance Verdict.

147. In relation to Section 1 c) of the Operative Part of the First Instance Verdict (Section 1 b) herein), the Appellate Panel concludes that the factual findings were correctly and completely found. The Defense contests this Section by pointing to their interpretation of the testimony of witness "H". The First Instance Verdict contains a detailed summary of the testimony of this witness concerning the relevant circumstances. From the testimony of this witness ensue the facts

about his direct contacts with the Accused Bundalo, namely that the Accused Bundalo called him and told him that a military unit at Morina informed him about a large group of persons who had been captured. The police, together with this unit, detained the group in a school in Ulog. The Accused Bundalo told him to ask for trucks from the Kalinovik Brigade in order to release women, children and the elderly to go where they wanted. Furthermore, this witness also testified about his contact with Boško Govedarica. By selective interpretation of this testimony, the Defense points only to the participation and liability of the police. In their Appeal, the Defense does not refer to the portions of the testimony of this witness which clearly and undoubtedly confirm the participation of both the Accused Bundalo and the military. In relation to this Section, the Defense groundlessly points to the omission of the Trial Panel to give credence to witness "H" because it ensues from the reasons of the contested Verdict that the credence was given to this witness in relation to this Section.

148. It is necessary to note that with regard to this Section, the Defense disregards the state of facts found based on ample evidence (the testimony of witness Enes Hasanbegović, witnesses D, E, F, A, W, Rade Pavlović, Milivoje Faladžić, Željko Mandić, Dušan Cerovina, Miloš Veletić, Danilo Đorem, Ranko Erbez) mutually combined and which confirm the state of facts contained in the referenced Section.

149. In relation to Section 1 d) of the Operative Part of the First Instance Verdict (Section 1 c) herein), the Appellate Panel finds that the state of facts was established correctly and completely. The Defense raised these appeal arguments during the criminal proceedings. The Trial Panel evaluated all pieces of evidence adduced, individually and mutually combined in a comprehensive manner. The Trial Panel correctly decided not to accept as credible the findings and opinion of expert witness Mladen Prole, which was contrary not only to the testimony of witness Pavlović, but also to all other evidence adduced. The Defense theory about the existence of two tactical groups has no basis in the adduced evidence. All the witnesses testified directly[36] or indirectly about the existence of the TG Kalinovik and its Commander: Ratko Bundalo. The First Instance Verdict described the Accused's role and his capacity as the Commander of the TG Kalinovik, the Trial Panel presented ample evidence to support this conclusion. The Appellate Panel did not find any evidence that would cast doubt on the factual findings concerning the existence of the TG Kalinovik.

[36] Witness H and Rade Pavlović.

150. Furthermore, it is quite clear that a large number of persons participated in the critical incident including witness Pavlović. Pavolić did not deny this fact. However, the participation of other persons does not release the Accused Ratko Bundalo from his liability.

151. The Trial Panel evaluated the testimonies pointed out by the Defense[37] and the contents of their testimony were included in the reasons of the contested Verdict. The Defense only mentions their contents, but indicates no basis for calling into question the state of facts of the contested Verdict in relation to these witnesses.

152. In relation to this Section, the Defense also invokes an alibi which the Trial Panel did not accept. The Appellate Panel upheld this decision in its entirety for the reasons given above.

153. In relation to Section 1 j), the Defense groundlessly submits that the matter was already adjudicated. The Appellate Panel provides below a detailed reasoning refuting this claim within the section on violations of the substantive law (appeal arguments under Article 298 of the CPC of BiH).

154. With regard to Section 1 i) of the Operative Part of the First Instance Verdict (Section 1 d) herein), the Appellate Panel finds that the Trial Panel provided a detailed reasoning based on a comprehensive analysis of the testimony of witnesses Huso Tukelija and Đorđe Đorem. It ensues from these testimonies that the army also had a need to engage mine-sweepers to clean the road before the arrival of a convoy. Witness Tukelija was captured by soldiers and brought to the premises of the PSS Kalinovik which was used by the military for detention of prisoners of war and soldiers ordered into custody. The Trial Panel properly indicates that after Tukelija's exchange, the Accused Bundalo took over two prisoners from the KPD Foča to use as mine-sweepers and that they were detained on the premises of the PSS Kalinovik.

155. The Defense partially points only to the facts concerning the police escort for witness Tukelija). But it ensues from all the evidence adduced, as correctly inferred by the Trial Panel, that this witness was used as a mine-sweeper and that he drove a truck in front of both soldiers and civilian convoys under both the police and military escort. Witness Đorem also confirmed these facts. This witness was engaged in military activities and was once tasked to drive behind a vehicle driven by Huso Tukelija.

156. Bearing in mind the foregoing, the Appellate Panel finds that the arguments of the Defense contesting the facts concerning this Section of the Operative Part are unfounded.

157. The Appellate Panel finds the facts in Section 1 k) of the Operative Part of the First Instance Verdict upheld completely. As in the previous Sections, the Defense has given no arguments to support its position. The Defense contests the credibility of witness "A", continues to rely on only fragments of evidence then interprets this evidence as if it were complete and argues the liability of members of the police, and indirectly to the liability of witness Pavlović, all without support.

158. According to the Appellate Panel, the Trial Panel reasonably decided to give full credence to witness "A" in relation to this Section. The testimony of this witness was found to be credible as it was confirmed by the testimony of other witnesses.[38] Bearing in mind the complexity of the incident itself and the witnesses' different individual information about the incident, the witnesses are consistent in the parts about which they have personal knowledge. It ensues from the testimony of witness "A" that Boško Govedarica told the men present to set villages on fire pursuant to an order of the Accused Bundalo. They told Gojko Starčević, when he wanted to present them with the (written) order, that there was no need to do so. Witness Dušan Cerovina also testifies (although he took no part in the incident) that he has information that the army ordered setting the villages on fire. It ensues from the testimony of witness "A" that it was decided that the police would set on fire the village of Sočani, while soldiers would burn down other villages. The testimony of witness "A" was confirmed by the testimony of witness Milan Lalović, who testified that the Accused Zeljaja entered houses in Sočani. Željko Mandić testified about the return of the police from the village of Sočani.

159. Bearing in mind the above, the Appellate Panel finds that the facts were reasonably and completely founded. Appeal arguments of the Defense are entirely unfounded. There were no grounds raised to question the reasonableness of any finding by the Trial Panel. With regard to Section 1 l) of the Operative Part of the First Instance Verdict (Section 1 i) of this Verdict) the Appellate Panel finds that the state of facts were also reasonably and completely established. The arguments of the Defense contesting the testimony of witness Pavlović are unfounded. The Defense itself points to the fact that in his testimony, this witness does not deny and does not hide his role or participation. The Defense contests only the portion of the testimony in which this witness testifies that he got approval from the Accsued Bundalo to exchange the detainees and the manner in which it would be carried out. According to the Appellate Panel, witness Pavlović testimony before the Trial Panel was detailed and clear. This witness does not deny his participation and he does not try to conceal it either. The facts in his testimony which incriminate the Accused are not at the same

[37] Čedomir Okuka and Dragan Aleksandrov.
[38] Milan Lalović, Milivoje Faladžić, and Željko Mandić.

time exculpatory for himself, as the Defense claims. The theory of the Defense according to which by their testimony, the witnesses incriminate the Accused and exculpate themselves of liability has no foothold either in the evidence adduced or in the law. Article 180(3) of the CC of BiH clearly prescribes that the fact that a person acted pursuant to an order of a superior shall not relieve him of criminal responsibility.

160. The Appellate Panel holds that the challenged findings of facts whether based on oral or other evidence must not be set aside unless clearly erroneous. This Appellate Panel gives due regard to the to the Trial Panel's opportunity to judge the witnesses' credibility. Absent a showing here by the Defense that based on a review of all the evidence the findings of the Trial Panel are either clearly erroneous and are not supported by evidence the Appellate Panel will uphold the factual findings below.

(iv) Appeal Arguments of the Accused Ratko Bundalo relevant to Section 3 (*Barutni Magacin*)

161. According to the Defense, it was not proved that *Barutni Magacin* was under the command of Ratko Bundalo, that it was part of the *Donji Logor* compound, whose commander was Rade Pavlović. The Defense argues that there is no evidence which proves that the Accused issued any order whatsoever to the guards in *Barutni Magacin*. Also, it was the police who took the inmates for labour and the camp was under the authority of the police and civilian structures. The Defense refutes the testimony of witness "H"with regard to this Section as well, and claims that the state of facts was entirely erroneously established under Section 3 (including sub-sections).

a. Findings of the Appellate Panel

162. The Appellate Panel is satisfied that the Trial Panel correctly and completely established the state of facts under Section 3 of the Operative Part of the First Instance Verdict.

163. Contrary to the arguments of the Defense for the Accused Ratko Bundalo, the Trial Panel concluded based on the presented evidence that the Accused Bundalo had actively participated in the both the setting up and the operation of the *Barutni Magacin* camp. The Trial Panel properly concluded and the Appellate Panel entirely agrees that the Accused Bundalo was the Commander of the Kalinovik TG. In addition, the Panel found based on consistent witness testimony that *Barutni Magacin* was a military facility which belonged to the Kalinovik TG.[39] The Trial Panel correctly

[39] Witnesses Pavlović and Božo Purković.

concluded based on the testimony of witnesses Fevzija Hadžić, Rade Pavlović, Miloš Crnjak, Šćepan Jovović that *Barutni Magacin* had previously been used as an ammunition and weapons depot, that it was converted into a military camp and that it was only the Accused Bundalo who could issue the order to do so. The Trial Panel concluded that the testimonies of these witnesses were consistent and corroborated each other. There is no basis for the Appellate Panel to overturn this finding.

164. It stems from the testimony of witnesses Rade Lalović, Neđo Vuković, Miloš Crnjak, Vojin Puhalo[40], Manojlo Krstović and witness "I" that the army secured the premises. The appealed Verdict gave a detailed explanation based on this evidence and concluded that the Accused Đorđislav Aškraba (as a reserve police officer) was reassigned to the military service and appointed as the commander of the guards at *Barutni Magacin*.[41]

165. With regard to the account of facts under this section (including sub-sections), the Appellate Panel finds that the Defense selectively interprets fragments of the presented evidence by denying the participation of the army and the liability of the Accused and pointing exclusively to the role and participation of the Police. The appealed Verdict comprehensively evaluated all the presented evidence and relied on evidence to conclude that the authority of the army and of the police had overlapped. Specifically, both the army and the police senior officers had the authority to approve the taking out of the inmates.[42] The detainees were transferred from the school (which was guarded by the police) to *Barutni Magacin* (guarded by the army).

166. The Defense does not dispute the established facts relevant to individual sections, but rather they deny the conclusion of the Trial Panel as to the responsibility of the Accused. The Appellate Panel confirms the findings of the Trial Panel that the Accused was the commander of the Kalinovik TG, that he established the *Barutni Magacin* camp to keep the prisoners there, personally assigned some guards to the camp, and therefore, he was responsible for the incidents in *Barutni Magacin* which were explained in more detail in sub-sections 3 of the Operative Part of the First Instance Verdict.

167. The Appellate Panel is satisfied that the account of facts under Section 3 were properly and completely established. The selective interpretation of the presented evidence by the Defense does not cast doubt on the conclusions reached by the Trial Panel.

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[40] This witness was assigned as a guard by the Accused personally.
[41] Testimony of witnesses: "A", Hadžić Fevzija, Vuković Neđo, Krstović Manojlo; physical evidence: Receipt issued by Kalinovik PSS of 8 April 1993.

4. Sub-Ground Four: Incorrect establishment of decisive facts about the responsibility of Neđo Zeljaja

(i) Appeal Arguments of the Accused Neđo Zeljaja relevant to Section 1 of the Enacting Clausse of the First Instance Verdict

168. The Defense disputes the testimony given by witness "H" in Section 1 b) of the Operative Part of the First Instance Verdict and suggests that Boško Govedarica, the Chief of the Kalinovik PSS was to be held responsible. The Defense denies that the attack on Bosniak population referred to under this Section was wide-spread by its nature.

169. According to the Defense, Section 1 c) of the Operative Part of the First Instance Verdict did not contain the acts of perpetration of the Accused Zeljaja and the examined witnesses referred to Boško Govadarica as the person whom they contacted. The Defense claims that the Prosecution did not present a single piece of evidence which proved that the Accused had taken over and secured the civilians.

170. With regard to Section 1 d) of the Operative Part of the First Instance Verdict, the Defense refutes the participation of the Accused and points to his alibi. They also claim that Boško Govedarica was liable since the witnesses stated that they executed his orders.

171. The Defense refutes the account of facts under Section 1 h), i), j) of the Operative Part of the First Instance Verdict by arguing that Kalinovik PSS did not have any authority in that regard, therefore, the Accused Zeljaja could not have had any such authority. The Defense again points to the participation and liability of the army and Boško Govedarica.

172. The Defense submits that the *in dubio pro reo* principle was violated in Section 1 k) of the Operative Part of the First Instance Verdict since the Trial Panel failed to evaluate the evidence of the Defense. The Defense support their averments by Official Note of 23 July 1992 which shows that Kalinovik PSS conducted an on-site investigation of the arson in Sočani. The investigation concluded that the alleged perpetrators were four unidentified perpetrators who wore masks.

[42] House Rules – in addition to the Kalinovik TG Commander, the Chief of the Kalinovik PSS is also authorised to approve the taking out.

173. According to the Defense, the Accused did not have any role regarding the exchange under Section 1 1) of the Operative Part of the First Instance Verdict and witness Pavlović confirmed that the army was in charge of the exchange.

a. Findings of the Appellate Panel

174. The Appellate Panel is satisfied that the account of facts under Section 1 (a), b), c), d), h), i), j), k), l)) relevant to Neđo Zeljaja was reasonably and completely established.

175. Given that the revised portions in the Operative Part of this Verdict, Sections 1 a), c), d), i), j), k), l), concern both Accused, the reasoning of this Verdict relevant to the arguments of the Appeals within the meaning of Article 299 of the CPC of BiH is entirely applicable to the Accused Zeljaja as well.

176. Furthermore, the Appellate Panel finds that the Trial Panel established the account of facts under Section 1 b) and , based on the credible evidence, properly concluded that the Accused Neđo Zeljaja actively participated in the planning and executing of the plan of imprisonment of all able-bodied Bosniak men. Witness "H" testified that the Accused Zeljaja attended (at least once) a meeting where the plan to imprison Bosniaks was discussed. The Appellate Panel holds that the Defense does not provide any specific facts or cirsumstances that could raise suspicion about the credibility of this witness. His testimony was indirectly substantiated by the testimony of other witnesses, for instance witness Mevlida Ćustović. Witness Ćustović indicated that the Accused Neđo Zeljaja was aware of the planned capture and also that he had the information from the field. This conclusion is supported by the testimony of witness Fejzija Hodžić and witness "Z" who testified to have heard that the Accused had been in the village of Jelašca during the arrest. However, this type of indirect information (*hearsay)* does not have the same degree of probative value as direct evidence that can incriminate the Accused. Under the principle of free evaluation of evidence it cannot be considered completely irrelevant, as the Defense argues. This evidence is taken as corroborative evidence that gives support to the testimony of witness "H" and was evaluated as such by the Trial Panel.

177. The Defense denies the existence of a wide-spread attack, but the Appellate Panel finds that the Trial Panel correctly concluded there was a wide-spread and systematic attack against civilians of the Kalinovik Municipality, and the Panel reached such conclusion on the grounds of the entire presented evidence, not only on the grounds of evidence and facts contained in Sub-Section 1 b) of

the Operative Part of the First Instance Verdict.

178. With regard to Section 1 c) of the Operative Part of the First Instance Verdict, the Appellate Panel dismisses the arguments of the Defense Appeals as entirely unfounded. The account of facts under this Section is clear and complete, as the Appellate Panel already stated in Part III of this Verdict (Essential Violations of the Criminal Procedure). As oppposed to the arguments of the Appeals, the disputed Verdict gave a detailed and comprehensive analysis of the evidence taken to conclude that both the army and the police participated in the arrest described under this Section. It followed from the testimony of witness Ranko Erbez (policeman), among others, that there was a Branch Police Station in Ulog which was subordinated to the Police Station in Kalinovik, whose commander was Neđo Zeljaja. Witness Lalović (Branko) Milan testified that during the imprisonment in Gacko, the Accused Zeljaja came to the school and visited guards and prisoners, while witness Željko Mandić said that the Accused Zeljaja had written patrol orders. In brief, this is the crucial evidence based on which the Trial Panel correctly established the account of facts under Section 1 c) of the Operative Part of the First Instance Verdict. The Defense is justifed in pointing out that "writing orders" does not amount to the perpetration of the criminal offense the Accused is charged with. However, it clearly follows from the Reasoning of the appealed Verdict that the testimony of witness Lalović and this fact were used to substantiate other evidence relevant to the participation of the Accused.

179. The Appellate Panel finds that the Trial Panel properly established the account of facts under Section 1 d) of the Operative Part of the First Instance Verdict. The appealed Verdict gave a detailed explanation and referred to evidence based on which the Trial Panel reached their conclusion about joint action and participation of both the army and the police in the attack on the village of Jelašca.

180. The Trial Panel properly and completely evaluated the entire evidence used by the Defense to prove the alibi of the Accused (witnesses Ilija Đorem, Milan Elez, witness "A", Dr. Mirko Ćerović). Nevertheless, the Trial Panel concluded that this was in contravention of all other presented evidence, in particular the documentary evidence inspected by the Panel (Patients Record of the Kalinovik Health Centre from 24 July 1992 to 7 September 1992). The documentary evidence shows that the Accused had a check-up in the health centre, but he was not referred anywhere else, he did not stay in the base hospital, nor was he relieved from duty. Also, the Patients Record for 30 July 1992 shows that Neđo Zeljaja underwent a medical check-up, but was not relieved of his duty on that occasion either. Based on the presented evidence, the Trial Panel reasonably concluded that Dr. Ćerović's opinion that the Accused had to stay in bed was not

corroborated by any other presented evidence. It was therefore given little weight and rejected as not being credible.

181. The Trial Panel was justified in finding the testimony of witnesses Ilija Đorem, Milan Elez and witness "A" about the alleged presence of the Accused Zeljaja at the front line unreliable, illogical and contradictory, internally inconsistent and in contravention of their earlier testimony and written statements. The Trial Panel thoroughly explained the inconsistencies and discrepentacies in the testimony of these witnesses, and found that these pieces of evidence could not be taken as credible and therefore serve to prove the alibi of the Accused. The Appellate Panel upholds this finding in its entirety.

182. The Appellate Panel is satisfied that the Trial Panel properly concluded on the basis of the presented evidence that the Accused Zeljaja, as the commander of the guard, signed patrol orders, and assigned duties. The Police could not go to Jalašca and bring the captured civilians to the school without his involvement. The Defense cannot raise suspicion as to the properly established account of facts relevant to the Accused Zeljaja and Section 1 d) of the Operative Part of the First Instance Verdict by arbitrary interpretation of only some pieces of evidence. The *in dubio pro reo* principle was not violated here because the Trial Panel evaluated all the evidence in their combination, paying special attention to the evidence offered by the Defense to prove the alibi of the Accused. The Appellate Panel is satisfied that the factual conclusions based on the decisive facts were reasonably established in the appealed Verdict and the Defense failed to cast doubt on them.

183. In relation to Sections 1 h), i), and j) of the Operative Part of the First Instance Verdict, the Appellate Panel concludes that the Trial Panel properly found the decisive facts. The Defense disregards the evidence which was analyzed in detail in the contested Verdict and based on which the Trial Panel established the decisive facts. It ensues from the testimony of witness Vuk Jašar that he was brought to the PSS Kalinovik and handed over to the Accused Zeljaja who escorted him to the basement premises. Witnesses confirm the fact that the Accused was the Commander of the Police Station within the PSS Kalinovik, and that he actively participated in the detention of Bosniak civilians on the basement premises of the PSS Kalinovik. Contrary to the appeal arguments, the Trial Panel evaluated the evidence adduced in relation to the status of the detained persons. With regard to Section 1 h), the Trial Panel found that the detainees were civilians, except for witnesses FWS-130 and K.G., about whose deprivation of liberty the Court had no information, but pursuant to Article 50(1) of the Additional Protocol 1 to the Geneva Conventions, considered them civilians due to the existence of a suspicion. In Section 1 i), the Trial Panel determined the

status of the aggrieved Huso Tukelija, who was arrested as an armed soldier of the BiH Army. However, regarding the use of this witness as a mine-sweeper, the Trial Panel found from the evidence adduced that the witness had walked in front of civilian and military convoys, under the police and military escort.

184. The Trial Panel properly found from the evidence adduced that the Accused was cognizant of the status of these persons, the reasons of their detention in the Police Station and the work that they performed. However, the Accused nevertheless actively participated in the maintenance of such status and engagement. As the First Instance Verdict properly indicated, the testimony of witness Tukelija, who testified that the Accused had met him on a number of occasions after he returned from performing these tasks, significantly speaks about the knowledge and awareness of the Accused.

185. In relation to Section 1 k) of the Operative Part of the First Instance Verdict, the Appellate Panel finds that the First Instance Verdict contains properly and completely established state of facts. The presence of the Accused in Sočani and his participation in the critical incident ensue from the testimony of witnesses "A" and Milan Lalović (son of Branko). It follows from the testimony of these witnesses that the Accused led a group and that he personally entered into some houses. While there was no direct testimony offered that saw him actually setting the houses on fire, there was circumstantial evidence. Witness "A" testified that police officer Željko Mandić had seen Zeljaja's soot-covered face (after the police returned from the village of Sočani). The Trial Panel correctly established that the Accused Zeljaja came to Sočani together with a high-ranking military officer and commanders of the PSS to lead the police in the commission of this offense.

186. Joint participation of the police and the military quite clearly ensues from both Operative Part of the First Instance Verdict and its Reasons. Therefore, the Defense arguments emphasizing only the liability of the military have no basis in the evidence adduced.

187. In relation to Section 1 l) of the Operative Part of the First Instance Verdict, the Appellate Panel finds that the appeal arguments of the Defense cast no doubt on the proper establishment of the decisive facts. The Defense presents their theory without evaluating the evidence which the Trial Panel accepted as credible. The Trial Panel properly found the participation of soldiers, but also of the PSS members who were actively involved.

(ii) Appeal Arguments of Accused Neđo Zeljaja concerning Section 2 of the Operative Part of the First Instance Verdict

188. In relation to Section 2 of the Operative Part of the First Instance Verdict, the Defense contests the direct participation of the Accused and submits that the failures of the police were not described at all, and that the witnesses heard had no objections to the police behavior. The Defense submits that the incidents took place in the absence of the Accused. The basis of the Defense theory is the findings and opinion of expert witness Matijević. The Defense contests the state of facts in its entirety.

a. Findings of the Appellate Panel

189. According to the Appellate Panel, the First Instance Verdict contains a detailed and overall analysis of the evidence adduced in relation to the circumstances referenced in Section 2 (with sub-sections). The Defense indicates a small number of evidence (O-III-1, T-34, T-226, the testimony of witness Džemila Redžović and the Findings and Opinion of expert witness Matijević), based on which it claims that doubt is cast on the conclusions of the Trial Panel.

190. First and foremost, it should be stated that the Court must evaluate each piece of evidence individually, but also mutually combined. Only such evaluation of evidence can be accepted by the Court (either Trial Panel or Appellate Panel). The Appellate Panel cannot accept any partial and selective evaluation of the evidence adduced, that is, the conclusions reached in such manner are legally insufficient. The Defense contests the participation of the Accused and his liability in an arbitrary and general manner. These arguments have no merit.

191. The Trial Panel found the relevant facts in the contested Verdict completely and properly. The witnesses detained at the critical time in the *Miladin Radojević* Elementary School, were civilians when arrested, were presented with no decision upon their arrest, no proceedings were conducted against them and thus they were unlawfully arrested and detained.[43]

192. Prior to its implementation, the plan of detention of the able bodied Bosniak men was considered in the TG Kalinovik Command. With others, Zeljaja also attended these meetings as the Chief of the Police Station. The Trial Panel reached this conclusion based on the testimony of witness "H" whose credibility the Defense contests in general. As indicated earlier, the Appellate Panel finds that no reasons or facts exist to indicate that the testimony of witness "H" is not reliable. It is correct that this witness participated in the overall events, including the incriminated acts. However, at the same time, by his testimony this witness neither diminishes nor denies his personal participation. Even though the witness incriminates the Accused by his testimony, the testimony of

[43] Ahmo Mušanović, Asim Zametica, Mevlida Čustović, witness "X", Emka Velić, Elvira Ćemo, and Fevzija Hadžić.

this witness goes to his personal detriment at the same time. The testimony of this witness is consistent, detailed and precise to the extent to which a testimony of an average man can be after the elapsed period of time. Furthermore, the fact that only in his subsequent statements this witness presented additional information about certain facts (about the referenced meetings, among other things) cannot be considered a decisive fact that would call into question the credibility of his earlier testimony taken as a whole. What matters in evaluating the credibility of this testimony is the fact that in his first testimony, the witness did not deny this fact or misrepresent it. His subsequent testimony supplements and clarifies the already given evidence (statement). Therefore, according to the Appellate Panel, no reasons exist due to which doubt would be cast on whether a reasonable trier of fact could find this witness not to be credibile.

193. Furthermore, the Trial Panel properly found that at the critical period, Zeljaja was the Police Station Commander, that in this capacity he assigned police officers to secure the *Miladin Radojević* School, and that he was the direct superior to the police officers who secured the school.[44]

194. Pursuant to the foregoing, the Appellate Panel concludes that the Trial Panel properly found that the Accused had participated in the setting up and securing of the camp in the *Miladin Radojević* Elementary School, and that despite the information about the incidents that were taking place, as described in sub-sections of Section 2, he continued to secure in the same manner and took no measures whatsoever to change the situation.

195. Bearing in mind the above, the Appellate Panel refuses as ungrounded the appeal arguments of the Defense regarding the incorrectly and incompletely established state of facts in terms of Article 299 of the CPC of BiH.

5. Sub-Ground Five: New Evidence

(a) The Appellate Panel finds that the proposals of the Defense for the Accused Ratko Bundalo and Neđo Zeljaja to adduce new evidence are not grounded. The Defense did not indicate new facts or evidence which would cast doubt on the correctness and completeness of the established state of facts.

[44] Testimony of witness Milan Lalović (son of Branko), statement of witness Miloš Veletić, testimony of witness "A", Book of Rules on International Organization of the MoI SR BiH.

(i) Appeal of the Accused Ratko Bundalo and Neđo Zeljaja

196. The Defense for both Accused submit that the state of facts was incompletely and incorrectly established, and propose new evidence in terms of Article 299(2) of the CPC of BiH.

197. The Defense for the Accused Ratko Bundalo proposed new evidence as follows:

1. The ICTY document ERN number 00277305 (concerning the origin, composition and activities of the SOS units subordinated to Arkan);

2. Order of the Command of the 2nd Military District on organizational and formational changes, dated 10 March 1992; and

3. Two pieces of evidence by which the Defense wants to point to the unreliability of witness H.

198. The Defense for the Accused Neđo Zeljaja propose 4 documents as new evidence:

1. Decision on the allocation of the KPD Foča premises to intern prisoners of war and detainees, a document certified by the ICTY;

2. Document of the MoI-State Security Service Sarajevo dated 4 July 1995, signed by Nedžad Ugljen, stating the implementers for the Kalinovik Municipality;

3. Chemical expert evaluation in order to establish the entry date for Exhibit O3-3; and

4. ICTY Rule 75H) Application proposed during the main trial, the presentation of which was rejected by the Trial Panel.

a. Findings of the Appellate Panel

199. Article 299(2) of the CPC of BiH prescribes that "[i]t shall be taken that the state of facts has been incompletely established when new facts or new evidence so indicates." This statutory provision points to the conclusion that the state of facts can be incompletely established also if the parties and the Defense, and/or the Court did not collect or adduce all available evidence, whose presentation was necessary. This statutory provision should be first interpreted in relation to Article 263(2) of the CPC of BiH pursuant to which the Court is authorized to reject the presentation of the proposed piece of evidence if the Court finds such evidence irrelevant. Secondly, in relation to Article 295(4) of the CPC of BiH:

> New facts and new evidence, which despite due attention and cautiousness were not presented at the main trial, may be presented in the appeal. The appellant must cite the reasons why he did not present them previously. In referring to new facts, the appellant must cite the evidence that would allegedly prove these facts; in referring to new evidence, he must cite the facts that he wants to prove with that evidence.

200. Therefore, the law allows presenting new facts and new evidence in the appeal which despite due attention and caution could not be presented at the main trial. However, the strict statutory formulation requires that the appellant must cite the reasons why he did not present them previously. However, regardless of the fact that the appellant failed to state such reasons or to explain them sufficiently, it must be taken into account that such omissions are not sanctioned by the law. As the above points to the conclusion that, in fact, the purpose of such statutory provision is to achieve the discipline of the parties, then it is clear that in relation to such appeal arguments, the Court must examine whether these new facts and new evidence are relevant and whether they impact the issuance of a proper decision.

201. Bearing in mind the abovementioned statutory provisions, the Appellate Panel finds that the Defense proposals concerning the presentation of new evidence are not grounded.

202. Like previously explained in the section of this explanation concerning the essential violations of the criminal procedure, the evidence that Defense for the Accused Zeljaja proposed in the appeal had already been proposed during the main trial. The Trial Panel refused as unnecessary the presentation of the proposed evidence, and provided valid reasons for that during the main trial. Therefore, the actions of the Trial Panel were correct in their entirety and taken pursuant to their powers prescribed in Article 263(3) of the CPC of BH.

203. According to the Appellate Panel, by their appeal arguments, the Defense for the Accused Zeljaja did not bring into suspicion the validity and lawfulness of the decision of the Trial Panel. By pointing to the evidence that was not presented, the Defense did not cast doubt on the correctness and completeness of the established state of facts.

204. The proposal of new evidence by the Defense for the Accused Bundalo contains no reasoning regarding the question as to why the Defense did not present this evidence earlier. The evidence proposed by Defense regarding the SOS units that were subordinated to Arkan is not relevant to this case. The Defense provides irrelevant explanation of the deficiencies in terminology of the First Instance Verdict regarding the "Serb armed forces." From the Operative Part and the Reasons of the First Instance Verdict it is indisputable that the First Instance Verdict does not refer

to the unit named "Serb Armed Forces" SOS which was subordinated to Arkan (the nouns having the character of proper nouns), but generally to soldiers who were members of the Serb armed forces (general nouns indicating a group with common characteristics). In this respect, the Appellate Panel finds irrelevant the presentation of evidence in order to prove these term differences that the Defense represents as relevant by interpreting them in a biased manner.

205. Furthermore, the other piece of evidence, as indicated by the Defense itself, was already evaluated in terms of its contents through the testimony of witness Rade Pavlović (*who did so upon receiving an order, pursuant to his admission)*[45]. The Appellate Panel finds that the presentation of this evidence would not essentially influence the factual findings of the First Instance Verdict.

206. Furthermore, the Appellate Panel refuses the Defense proposal to adduce evidence in order to contest the testimony of witness "H". This proposal of the Defense was not sufficiently concrete. The Defense states no specific evidence or facts arising from this evidence, nor how they affect the conclusion of the Trial Panel about the credibility of the testimony of witness "H". Even during the main trial, the Defense contested the credibility of witness "H". The Trial Panel already presented its view in detail regarding this issue.

207. Bearing in mind all the foregoing, the Appellate Panel finds that, except for the general and arbitrary circumstances pointed to by the Defense for both Accused regarding the new evidence, the appeals stated no concrete facts which the Defense wants to prove by this new evidence.

208. According to the Appellate Panel, the evidence proposed by the Defense teams for both Accused as new evidence constitute the evidence which would be presented with regard to the same circumstances regarding which evidence was already adduced in the first instance proceedings. The view of the Appellate Panel is that this evidence would not significantly affect the established state of facts, that is, the relevant facts would not be established differently. Therefore, the proposed new evidence does not have the character of important evidence and cannot affect a decision in this case.

(b) Conclusion

209. Therefore, The Appellate Panel finds that the proposals of the Defense for the Accused Ratko Bundalo and Neđo Zeljaja to present new evidence are not grounded. The Defense indicated no new facts or evidence that cast doubt on the correctness and completeness of the established state of facts.

V. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC OF BIH: VIOLATIONS OF THE CRIMINAL CODE

A. STANDARDS OF REVIEW

210. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of its claim, and explain how the error affects the decision resulting in its unlawfulness.

211. Where an error of law arises from the application in the Verdict of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

212. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

B. APPEALS OF THE ACCUSED RATKO BUNDALO AND NEĐO ZELJAJA

1. Sub-Ground One: Application of the Criminal Code of BiH

(a) The Appellate Panel dismisses the Defense arguments regarding the applicability of the CC of BiH because they are unfounded.

213. Violation of the criminal code under Article 298(d) of the CPC of BiH occurred if the court applied properly established state of facts under the wrong legal provision, or if it applied the law

[45] Appeal of the Defense Counsels for the First-Accused, Attorneys Krešimir Zubak and Dražan Zubak, p. 18.

that that could not have been applied or the law that should have been applied, but in a wrong manner.

(i) Appeal Arguments of the Accused Ratko Bundalo and Neđo Zeljaja

214. The Defense argue in their Appeals that the Trial Panel erred in applying the 2003 CC of BiH since the criminal offense of Crimes against Humanity was not codified as a criminal offense at the time of perpetration.

215. According to the Defense, the Trial Panel violated the principle of legality guaranteed under Article 7(1) of the ECHR by applying the CC of BiH of 2003. The Defense argues that the CC of SFRY should have been applied as the law that was in force at the time the offense was allegedly committed and as the more lenient law for the perpetrators.

a. Findings of the Appellate Panel

216. Contrary to the arguments of the Appeals, the Appellate Panel is satisfied that Article 7(1) of the ECHR was not violated by applying the CC of BiH.

217. In the disputed Verdict, the Trial Panel provided an exhaustive analysis of Articles 3), 4) and 4a) of the CC of BiH and Article 7(1) and (2) of the ECHR, which is entirely upheld by the Appellate Panel.

218. The principle of legality is an imperative norm prescribed under Article 7(1) of the ECHR which has priority over all other law of Bosnia and Herzegovina (Article 2(2) of the Constitution of BiH). Article 7(1) of the ECHR prescribes as the general principle that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed.[46]

219. However, paragraph (2) of Article 7 of the ECHR contains an important exception with regard to paragraph (1) of the same Article and it provides that "this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[46] (1) "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed."

220. Article 15 (1) and (2) of the UN International Covenant on Civil and Political Rights contains similar international law provisions that have to be considered as *lex superioris* "... with regard to 'the general principles of law recognized by the community of nations.'"[47]

221. The customary status of responsibility and culpability relevant to Crimes against Humanity and individual criminal responsibility for the perpetration thereof in the course of 1992 was confirmed on 3 May 1993 by the UN Secretary General in his Report to the Security Council regarding Resolution 808, by the International Law Commission (1996) and the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") case law.

222. Crimes against Humanity constitute an imperative norm of international law and there is no doubt that they were part of customary international law in 1992.

223. The CC of BiH was applied to this specific criminal offense pursuant to Article 4a) of the CC of BiH: "Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law." As it is properly concluded in the disputed Verdict, this provision makes an exemption from the general principles laid down in Articles 3 and 4 of the CC of BiH in the sense that they shall not prejudice the trial and punishment of any person for any act or omission which amounts to the criminal offense of Crimes against Humanity which was not codified as such under the criminal law that was in force at the time when the offense was committed.

224. Crimes against Humanity are recognised as crimes under international law and their prosecution falls under universal jurisdiction. Therefore, Article 7(1) of the ECHR is not violated if an individual is convicted of such offenses pursuant to the law that subsequently prescribed and defined this act as a criminal offense and foresaw a criminal sanction thereto. This position is taken in the case No. 51 891/99, *Naletilić vs. Croatia,* regarding the same objections raised by the Appellant in that case as are raised by the Defense in this case.

[47] International Covenant on Civil and Political Rights, adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976; in accordance with Article 49, Article 15: "1) No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

225. The Appellate Panel recalls the legality of the application of the 2003 Criminal Code in proceedings before the Court of BiH has been exhaustively considered and addressed by the Constitutional Court in its *Maktouf* decision.[48] The Defense failed to raise any additional issues or arguments that would cause the Appellate Panel to reconsider the application of the Constitutional Court's conclusion in the instant proceeding. Therefore, the Appellate Panel considers that this ground of appeal is manifestly ill-founded, and accordingly is dismissed.

226. The Constitutional Court of BiH addressed this issue in their Decision No. AP 1785/06 of March 2007 (*Maktouf)* and in the Decision No. AP 408/07 of 11 February 2010 (*Dragoje Paunović*).[49] In these Decisions, the Constitutional Court of BiH referred to the applicable provisions of Article 4a) of the CC of BiH and Article 7(2) of the ECHR and concluded that the application of the CC of BiH before the Court of BiH is not in violation of Article 7 of the ECHR. This conclusion is substantiated by the ECtHR case law, specifically the cases under which the general interpretation of Article 7 of the ECHR was established.[50]

227. The Reasoning of the disputed Verdict contains valid arguments which undeniably prove that Crimes against Humanity constituted as criminal offense under the general principles of international law and this conclusion is upheld by this Panel. Therefore, the Trial Panel was entirely justified in applying the provisions of the CC of BiH to the properly and completely established state of facts.

228. The Defense also erroneously argues that the adopted Criminal Code of SFRY foresaw more lenient sanctions for the perpetrators. The Trial Panel properly concluded that the applicability of the CC of BiH was additionally justified by the fact that the sanction foreseen in the CC of BiH is in any event milder than the capital punishment which was in force at the time of the perpetration of the criminal offense. The Appellate Panel entirely upholds the decision made by the Trial Panel with regard to the principle of time application of the criminal code and the law more lenient to the perpetrator.

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[48] Constitutional Court, Decision on Admissibility and Merits No. AP1785/06 of 30 March 2007, Official Gazette of Bosnia and Herzegovina No. 57/07 ("*Maktouf* Decision"), para. 60-79. The Appellate Verdicts of the Court of BiH that have addressed this issue are: X-KRŽ-05/70 Radovan Stanković, X-KRŽ-05/51 Damjanović Dragan, X-KRŽ-05/154 Radisav Ljubinac, X-KRŽ-05/161 Gojko Janković, X-KR-05/165 Nenad Tanasković, X-KRŽ-06/275 Mitar Rašević et al., X-KRŽ-07/382 Mirko Todorović et al., X-KRŽ-06/202 Lelek Željko, X-KRŽ-06/200 Željko Mejakić et al., X-KRŽ-07/478 Momir Savić, X-KRŽ-08/500 Nikačević Miodrag, X-KRŽ-07/442 Predrag Kujundžić, X-KRŽ-05/16 Dragoje Paunović, X-KRŽ-05/40 Nikola Kovačević, X-KRŽ-06/234 Zoran Janković, X-KRŽ-06/290 Jadranko Palija, X-KRŽ-07/405 Ranko Vuković et al., X-KRŽ-06/236 Božić et al..

[49] *See Maktouf* Decision, Official Gazette of Bosnia and Herzegovina No. 57/07; Decision on Admissibility and Merits No. AP 408/07 of 11 February 2010, ("*Paunović* Decision"), para. 50-52.

[50] *See* ECtHR, *Konov v..Latvia* [GC] judgment of 24 July 2008, No. 36376/04, and *Kolk and Kislyiy v. Estonia,* Judgment of 17 January 2006, No. 23052/04 and 24018.

229. The Defense incorrectly submits that the capital punishment was abolished in the meantime. When two or more laws are examined in order to assess which one of them is more lenient, a sanction may not be separated from the totality of goals sought to be achieved by the criminal policy at the time of the application of the law. This position is taken by the Constitutional Court of BiH in their Decision No. AP 1785/06 *Maktouf*.[51]

(b) Conclusion

230. In view of the abovementioned, the arguments of the Defense relevant to the applicability of the CC of BiH are dismissed as unfounded.

2. Sub-Ground Two: Application of Joint Criminal Enterprise

(a) The Appellate Panel finds that the Trial Panel erroneously applied Article 180(1) of the CC of BiH, and as a result the Appellate Panel revised the First Instance Verdict by finding the Accused guilty only under those sections that were properly explained and to which relevant legal provisions can be applied.

(i) Appeal Arguments of the Accused Ratko Bundalo and Neđo Zeljaja

231. The Defense for both Accused contest the applicability of Joint Criminal Enterprise ("JCE") as a mode of liability submitting that the Court applied a theory which is not codified under the criminal legislation of BiH and its application is in contravention of the principle of legality. The Defense substantiate their position by quoting the *Božić et al.* Verdict[52]:

> Before turning to the discussion of the issues raised by the Prosecutor in his appeal, the Appellate Panel notes that the scope and limits of JCE doctrine have not yet been definitively determined even by the international tribunals. Legitimate concerns have been raised as to the potential for JCE liability to be developed or applied in such a way as to extend a defendant's liability beyond the appropriate limits of individual criminal responsibility.[53] Accordingly, the Appellate Panel emphasizes that pleadings of JCE must be handled with great caution and particularity to avoid a blanket, ″one size fits all″ approach to cases and to ensure the right of an accused to a fair trial.

[51] *See* Constitutional Court, Decision on Admissibility and Merits No. AP1785/06 of 30 March 2007, Official Gazette of Bosnia and Herzegovina No. 57/07, paras 68-69.
[52] *Božić et al*., X-KR-06/236 (Court of BiH), Second Instance Verdict, 5 October 2009, para. 113.
[53] The Appeals Panel finds that this type of complaint is usually reserved for extended JCE (JCE III) allegations.

232. The Defense argues that this amounts to a violation of Article 298(1)(a) of the CPC of BiH.

233. According to the Defense, the Operative Part of the First Instance Verdict contains a number of deficiencies which demonstrate that the Trial Panel reached an incorrect conclusion about the existence of the JCE and the participation of the Accused Bundalo and Zeljaja in it.

234. The Defense argues that the Indictment does not indicate the specific category of JCE[54] and does not provide the identification of the plurality of participants thereto. Also, the acts of perpetration of the Accused were not adequately described.

235. The Defense point to several Sections of the Operative Part of the First Instance Verdict which refer to criminal offenses committed by unidentified perpetrators and unidentified units over unidentified victims during an unspecified period.[55]

a. Findings of the Appellate Panel

236. The Appellate Panel dismisses as unfounded the arguments of the Defense relevant to the applicability of JCE. In cases before the Court, basic JCE or JCE I and systemic JCE or JCE II have been adopted by the Court of BiH. However, the Defense is justified in arguing that the Operative Part of the First Instance Verdict does not contain the explanation of all elements of the Joint Criminal Enterprise sufficient to find the Accused guilty of the participation therein. The Appellate Panel holds that the description of acts of perpetration by the Accused is sufficient to allow the application of Article 29 of the CC of BiH. Therefore, the deficiencies of the First Instance Verdict amount to an incorrect application of the substantive law, that is, of the Criminal Code. Since the Trial Panel erroneously applied Article 180(1) of the CC of BiH, the Appellate Panel revised the First Instance Verdict by finding the Accused guilty only under those sections that were properly explained and to which relevant legal provisions can be applied. The Appeals Panel wants to stress that this does not mean there was not a JCE as to these arguments, but only that the deficiencies prevent the Appeals Panel from affirming this part of the Verdict.

[54] The three categories of JCE will be explained in detail below.
[55] Sections: 1e), 1f), 1g) 2, 2 d) and 2h) of the Operative Part of the First Instance Verdict.

b. Application of Joint Criminal Enterprise

237. The Trial Panel properly and thoroughly evaluated the form of liability, Joint Criminal Enterprise, its elements, and the categories.[56] The Appeals Panel recalls that Article 180 of the CC of BiH establishes the mode of criminal liability that the Panel must find in order to convict persons for crimes specifically referenced within Article 180 of the CC of BiH.

238. Article 180(1) is derived from and is identical to Article 7(1) of the ICTY Statute. Article 180(1) became part of the CC of BiH after Article 7(1) had been enacted and interpreted by the ICTY to include, specifically, joint criminal enterprise as a mode of co-perpetration by which personal criminal liability would attach.[57]

239. The international jurisprudence interpretation of the term "perpetrated" in Article 7(1), which was incorporated into domestic law as Article 180(1), specifically provides: (1) that JCE is a form of co-perpetration that establishes personal criminal responsibility; (2) that "perpetration" as it appears in Article 7(1) of the ICTY Statute (and hence also in Article 180(1) of the CC of BiH) includes knowing participation in a joint criminal enterprise; and (3) that the elements of JCE are established in customary international law and discernable. The Appeals Panel, in applying the term "perpetrated" in Article 180(1) must consider the definition of that term as it was understood when it was adopted from international law into the CC of BiH.[58]

240. The Appeals Panel recalls that joint criminal enterprise is not a crime itself, but a manner of commission of a crime.[59] The Appeals Chamber in *Tadic* was the first at the ICTY to identify and articulate three categories of JCE in existence in international law at the operative time.[60] Later ICTY cases identified these categories as follows: the first category is "general" or "basic," the second category is "systemic" and the third is "extended."[61]

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[56] *Bundalo* First Instance Verdict, pgs. 196-202.
[57] *Trbić*, X-KR-07/386 (Ct. of BiH), First Instance Verdict, 16 October 2009 ("*Trbić* First Instance Verdict"), para. 204; *Rašević and Todović,* X-KR-06/275 (Court of BiH), First Instance Verdict, 6 November 2008 ("*Rašević and Todović* First Instance Verdict"), p. 103. *See also Trbić*, X-KRŽ-07/386 (Court of BiH), Second Instance Verdict, 18 January 2011 ("*Trbić* Second Instance Verdict")..
[58] The Constitutional Court of BiH has held that the ICTY Statute is an "integral part of the legal system of Bosnia and Herzegovina" as it is one of the documents that regulates the application of international law to which BiH is subject under Article III(3)(b) of the Constitution of BiH. *Abduladhim Maktouf*, Case No. AP-1785/06, Decision on Admissibility and Merits on the appeal from the Verdict of the Court of Bosnia and Herzegovina ("*Maktouf* Decision"), 30 March 2007, para. 70; *Trbić* First Instance Verdict, para. 206.
[59] *Trbić* First Instance Verdict, para. 210; *Rašević and Todović* First Instance Verdict, p. 111.
[60] *Prosecutor v. Tadić*, IT-95-1-A, Judgment, 15 July 1999 ("*Tadić* Appeal Judgment"), para. 220.
[61] The ICTY has referred to general or basic JCE as JCE I, systemic JCE as JCE II, and extended JCE as JCE III. For clarity, this Verdict uses the terms "basic JCE", "systemic JCE" and "extended JCE".

241. Joint criminal enterprise generally, and basic joint criminal enterprise in particular, were already part of customary international law by April 1992, and the elements and definition were established.[62] Since that time, the Trial Chambers and Appeals Chamber of the Tribunal have had several occasions to apply the concept of joint criminal enterprise, and particularly "basic" or "general" JCE and systemic JCE.[63] In so doing they have refined, but not changed, the understanding of basic JCE and systemic JCE within the context of the conflict within the former Yugoslavia. This Court is not bound by the decisions of the ICTY. However, the Appeals Panel is persuaded that the ICTY's characterization of basic JCE I and systemic JCE, its elements, *mens rea* and *actus reus*, properly reflects that state of customary international law as it existed in April 1992 and thereafter.

242. The BiH Appeals Panel in *Rašević and Todović* affirmed the First Instance Panel in their conclusion that joint criminal enterprise liability was part of customary international law at the time the offenses in the proceeding were committed (April 1992 through October 1994).[64] It is important to note that the First Instance Panel in *Rašević and Todović* expressly did not consider whether "extended" form (also referred to as JCE III) of joint criminal enterprise liability was part of customary international law between 1992 and 1995.[65] In *Miloš Stupar, et al (Kravice)*[66] and *Trbić*[67] also found this unnecessary. The Appeals Panel also finds it unnecessary here as only basic JCE or JCE I have been alleged by the Trial Panel.[68]

243. Regardless of the categories of JCE, a conviction requires a finding that the accused participated in a JCE. There are three requirements for such a finding: a plurality of persons, the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute (CC of BiH) and the participation of the accused in this common purpose.[69]

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[62] *Prosecutor v. Tadić*, IT-95-1-T, Judgment, 7 May 1997 ("*Tadić* Trial Judgment"), para. 669. *Tadic* Appeal Judgment, para. 220; *Prosecutor v. Stakic*, IT-97-24-A, Appeal Judgment, 22 March 2006, ("*Stakic* Appeal Judgment") para. 62 (same); *Prosecutor v. Vasiljevic,* IT-98-32-A, Appeal Judgment, 23 February 2004, ("*Vasiljevic* Appeal Judgment") para. 96-99 (same). *See also Trbić* First Instance Verdict, para. 211.

[63] *See also Prosecutor v. Krnojelec*, IT-97-25-T, Judgment, 15 March 2002 ("*Krnojelec* Trial Judgment"); *Prosecutor v. Kvočka et al.,* IT-98-30/1-T, Judgment, 2 November 2001 ("*Kvočka et al.* Trial Judgment"); *Prosecutor v. Stakić* Trial, IT-97-24-T, Judgment, 31 July 2003, ("*Stakić* Trial Judgment*"); Prosecutor v. Krajišnik,* IT-00-39-T, 27 September 2006 ("*Krajišnik* Trial Judgment")

[64] *Rašević and Todović*, X-KR/06/275 (Ct. of BiH), Second Instance Verdict, 6 November 2008, ("*Rašević and Todović* Second Instance Verdict") p. 26, and *Rašević and Todović* First Instance Verdict, p. 111.

[65] *Rasevic and Todovic* First Instance Verdict, p. 111.

[66] *Miloš Stupar et al (Kravice),* X-KR-05/24 (Ct. of BiH), First Instance Verdict, 29 July 2008.

[67] *Trbić* First Instance Verdict.

[68] *Bundalo* First Instance Verdict, p. 202.

[69] *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, 3 April 2007, ("*Brđanin* Appeal Judgment") para. 364.

244. The basic or general form of JCE is characterized by a group of people who act together pursuant to a "common design" and possess the same criminal intent. If a crime is committed by such a group, pursuant to that common design, persons who voluntarily participated in an aspect of that design and intended the criminal outcome can be held personally criminally liable as co-perpetrators.[70] "An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill."[71]

i. *Actus reus*

245. The elements of JCE which are discernable from the customary international law are easily identified. All three forms of JCE share the following *actus reus* elements[72]:

> 1. A **plurality of individuals.** They need not be organized in a military, political or administrative structure, as is demonstrated.
>
> 2. **The existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute (CC of BiH).** There is no necessity for this plan, design or purpose to have been previously arranged or formulated. It may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> 3. **Participation of the accused in the common purpose involving the perpetration of one of the crimes provided in the Statute (CC of BiH).** This participation need not involve commission of a specific crime under one of the provisions (murder, extermination, torture, rape, etc), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. The contribution need not be necessary or substantial, but should at least be a significant contribution to the crimes for which the accused is found responsible.[73]

246. In *Brđanin* the ICTY Appeals Chamber explained in establishing these elements, the Trial Chamber: "must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)."[74] Additionally, the Trial Chamber must "make a finding that this criminal purpose is not merely the same, but also

[70] *Trbić* First Instance Verdict, para. 214 citing *Tadic* Appeal Judgment, para. 196.
[71] *Trbić* First Instance Verdict, para. 214 citing *Vasiljevic* Appeal Judgment, para. 97.
[72] *Trbić* First Instance Verdict, para. 215. *See generally*, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment, 17 September 2003, ("*Krnojelac* Appeal Judgment") para. 31 and *Vasiljevic* Appeal Judgment, para. 100.
[73] *Trbić* First Instance Verdict, para. 215 citing *Brđanin* Appeal Judgment, para. 414; *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment, 17 March 2009, ("*Krajišnik* Appeal Judgment") para. 215.
[74] *Trbić* First Instance Verdict, para. 216 citing *Brđanin* Appeal Judgment, para. 430

common to all of the persons acting together within a joint criminal enterprise;[75] and characterize the contribution of the accused in this common plan."[76] Again, the contribution to the crimes for which the accused is to be found responsible should at least be significant.[77]

247. In order for the Panel to make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise it notes that the Appeals Chamber of the Special Court of Sierra Leone in *Sesay et al* listed factors derived from ICTY jurisprudence which are relevant to make this determination.[78] These factors include, but are not limited to: the manner and degree of interaction, cooperation and communication (joint action) between those persons;[79] the manner and degree of mutual reliance by those persons on each other's contributions to achieve criminal objectives that they could not have achieved alone;[80] the existence of a joint decision-making structure;[81] the degree and character of dissension; and the scope of any joint action as compared to the scope of the alleged common criminal purpose.[82] The Panel must find that persons alleged to constitute the plurality of persons joined together to achieve their common goal.[83]

248. A person who participates in a joint criminal enterprise in any of the following ways may be found guilty for the crime committed, all other conditions being met:[84]

> (i) by participating directly in the commission of the agreed crime itself (as a principal offender);
>
> (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or

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[75] *Trbić* First Instance Verdict, para. 216 citing *Brđanin* Appeal Judgment, para. 430; *Stakić* Appeal Judgment, para. 69.
[76] *Trbić* First Instance Verdict, para. 216 citing *Brđanin* Appeal Judgment, para. 430.
[77] *Trbić* First Instance Verdict, para. 216 citing *Brđanin* Appeal Judgment, para. 430.
[78] *Trbić* First Instance Verdict, para. 217 citing *Prosecutor v. Sesay et al*, Special Court for Sierra Leone, SCSL-04-15-A, Judgment, 26 October 2009, ("*Sesay et al* SCSL Appeal Judgment") para. 1141.
[79] See *Brđanin* Appeal Judgment, para. 410 (holding that whether a crime forms part of the common purpose may be inferred from the "fact that the accused or any other member of the JCE closely cooperated with the principle perpetrator in order to further common criminal purpose"); *Krajišnik* Trial Judgment, para. 884.
[80] *Krajišnik* Trial Judgment, para. 1082.
[81] That the plurality of persons "need not be organized in a military, political or administrative structure" as a matter of law does not imply that the presence or absence of such a structure is not a relevant evidentiary consideration. *Vasiljević* Appeal Judgment, para. 100; *Tadić* Appeal Judgment, para. 227.
[82] See *Brđanin* Appeal Judgment, para. 430 (the trier of fact must "specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims.")

[83] *Trbić* First Instance Verdict, para. 217 citing *Prosecutor v. Martić,* IT-95-11-A, Judgment, 8 October 2008, ("*Martić* Appeal Judgment") para. 172; *Brđanin* Appeal Judgment, para. 431.

[84] *Trbić* First Instance Verdict, para. 218 citing *Prosecutor v. Krnojelac,* IT-97-25-T, Judgment, 15 March 2002, ("*Krnojelac* Trial Judgment") para. 81.

(iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

249. This list is not necessarily exhaustive. The ICTY Appeals Chamber in *Vasiljević* explained that it is generally sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.[85] If the agreed crime is committed by one or another of the participants in the joint criminal enterprise, all of the participants in the enterprise are guilty of the crime regardless of the part played by each in its commission.[86] However, all persons (principal perpetrators) who carry out the *actus reus* of the crimes do not have to be members of a joint criminal enterprise.[87] At the same time, it is not necessary that the accused be present when the crime is committed in order to be guilty of the crime as a member of JCE.[88]

250. An accused or another member of a JCE may use the principal perpetrators to carry the *actus reus* of a crime.[89] However, "an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question forms part of the common criminal purpose."[90] This maybe inferred, *inter alia*, from the fact that "the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose."[91]

ii. <u>*Mens rea*</u>

251. As far as *mens rea* is concerned, this element distinguishes the three forms of liability.[92] Basic JCE requires that the accused must both intend the commission of the crime (this being the shared intent on the part of all co-perpetrators)[93] and intend to participate in a common plan aimed at its commission.[94]

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[85] *Trbić* First Instance Verdict, para. 219 citing *Vasiljevic* Appeal Judgment, para. 102.
[86] *Trbić* First Instance Verdict, para. 219 citing *Krnojelac* Trial Judgment, para. 82.
[87] *Trbić* First Instance Verdict, para. 219 citing *Brđanin* Appeal Judgment, para. 414.
[88] *Trbić* First Instance Verdict, para. 219 citing *Krnojelac* Appeal Judgment, para. 81.
[89] *Trbić* First Instance Verdict, para. 220 citing *Martić* Appeal Judgment, para. 68 citing *Prosecutor v. Martić,* IT-95-11-T, Judgment, 12 June 2007, ("*Martić* Trial Judgment") para. 438.
[90] *Trbić* First Instance Verdict, para. 220 citing *Martić* Appeal Judgment, para. 68 citing *Martić* Trial Judgment, para. 438; *Brđanin* Appeal Judgment, para. 418.
[91] *Trbić* First Instance Verdict, para. 220 citing *Martić* Appeal Judgment, para. 68 citing *Martić* Trial Judgment, para. 410; *Brđanin* Appeal Judgment, para. 410.
[92] *Tadić* Appeal Judgment, para. 228.
[93] *Trbić* First Instance Verdict, para. 221 citing *Vasiljevic* Appeal Judgment, paras. 97,101; *Krnojelac* Appeal Judgment, para. 31.
[94] *Trbić* First Instance Verdict, para. 221 citing *Brđanin* Appeal Judgment, para. 356 citing *Prosecutor v. Kvočka et al.,* IT-98-30/1-A, Judgment, 28 February 2005, ("*Kvočka et al* Appeal Judgment") para. 82 (requiring "intent to effect the common purpose"). (emphasis added)

252. The second type of joint criminal enterprise, systemic JCE, is a "variant" of general JCE.[95] The *mens rea* for systemic JCE is: personal knowledge of the organized system set in place and its common criminal purpose and the intention to further that particular system.[96] For both the first and second type of JCE, if the common criminal purpose involves commission of a crime that requires specific intent, for example, persecution, then the participant must share that specific intent.[97] However, shared intent, even specific intent, may be inferred.[98]

253. For the third form of JCE, the accused is held responsible for a crime outside the common purpose if, under the circumstances of the case:

> (i) it was foreseeable that such a crime might be perpetrated by one or more persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and
>
> (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.[99]

254. The Appeals Panel recalls that the third form of JCE has not been reviewed or adopted by the Court of BiH, and, as mentioned above, finds it unnecessary in this case to consider whether this form of JCE was part of customary law between 1992 and 1995.

iii. Joint Criminal Enterprise in the instant case

255. The Appellate Panel finds that the Joint Criminal Enterprise was not properly explained in this specific case. The Disposition of the Indictment, that is the Operative Part of the Verdict, did not adequately explain all the elements of the JCE. First of all, the participation of the Accused was not properly described.

256. The facts relevant to all elements of the Joint Criminal Enterprise and the participation of the Accused therein have to be presented in the indictment and included in the Operative Part of the first instance verdict.

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[95] *Rasevic and Todovic* First Instance Verdict, p. 112 citing *Tadic* Appeal Judgment, para. 203.
[96] *Rasevic and Todovic* First Instance Verdict, p. 112 citing *Tadic* Appeal Judgment, para. 203, 220 (citing *Belsen* and *Dachau Concentration Camp*).
[97] *Trbić* First Instance Verdict, para. 221 citing *Prosecutor v. Kvočka et al.,* IT-98-30/1-T, Judgment, 2 November 2001, ("*Kvočka*Trial Judgment"), para. 288.
[98] *Trbić* First Instance Verdict, para. 221 citing *Kvočka* Trial Judgment, para. 288.
[99] *Brđanin* Appeal Judgment, para. 411. See also ibid. para. 365.

257. Article 227(1)(c) of the CPC of BiH clearly prescribes that the indictment shall contain a description of the act pointing out the legal elements which make it a criminal offense, the object on which and the means with which the criminal offense was committed, and other circumstances necessary for the criminal offense *to be defined as precisely as possible.* All these elements form the factual basis of the indictment, which determines the subject matter of the criminal proceedings and/or the subject matter of the main trial. The factual basis of the indictment determines the subject matter of the trial and this is the basis for the verdict. The obligation to present a brief account of facts arises from the rights of the accused guaranteed under Article 7(3) of the CPC of BiH and Article 6(1) of the ECHR which provide that in the determination of any criminal charge against the accused has the following specific rights: 1) to be informed of the nature and cause of the accusation against him, 2) to be entitled to a fair trial, 3) to have adequate representation and 4) have an opportunity to prepare a Defense.

258. In addition, according to Article 227(1)(d) of the CPC of BiH, the Indictment shall contain the legal name of the criminal offense accompanied by the relevant provisions of the Criminal Code. The legal name of the criminal offense is the name of the offense as it is defined under the CC of BiH, accompanied by the provisions relevant to that criminal offense, its simple or aggravated form, or the form of liability or other provision of substantive nature that may be applied in the case at hand.[100] This is how the Prosecution shall define the criminal offense in the indictment.

259. Therefore, if the Prosecution charges the accused under the JCE form of liability, the underlying factual allegations of the Indictment must contain facts relevant to all elements of JCE. Given that the verdict is tied to the indictment, there is no doubt that the Operative Part of the first instance verdict must contain the facts relevant to the elements of the JCE.

260. Since the three categories of JCE differ, the Operative Part of the verdict and the indictment must clearly specify and describe one or more categories of the JCE the accused are charged with. This Panel holds that the indictment need not specify the category of the JCE (basic, systemic or extended), but it must contain a clear and precise description of the elements of JCE which leave no doubt as to the category of the JCE.

261. The Appellate Panel finds that the underlying factual allegations of the Indictment were not worded so as to indicate that the Accused's participation in the JCE corresponds to the *mens rea* required for basic JCE. The Trial Panel noted in the Verdict that the amended Indictment did not

specify the category of JCE the Accused were charged with.[101] However the Trial Panel went on to find only specific liability under basic JCE (JCE 1).[102]

262. Having applied the theory of JCE in this case, the Trial Panel attempted to remedy the deficiencies of the Operative Part of the First Instance Verdict in its reasoning. Nevertheless, a clear explanation of the criminal responsibility of the Accused and their participation must be included in the Operative Part of the Verdict, not in its reasoning.

263. Therefore, the Appellate Panel finds that the Criminal Code was violated. Had the law been properly applied, the account of facts describing the participation of the Accused Bundalo and Zeljaja would indicate the proper mode of liability, pursuant to Article 29 of the CC of BiH. Considering that the state of facts was properly established in this case, the Appellate Panel revised the First Instance Verdict and correctly applied the provisions of the substantive law.

264. Proper application of the law resulted in the modified Operative Part of the First Instance Verdict. The Accused have thus been acquitted of some charges since the acts were not properly described, in particular the participation of the Accused in those acts.

265. In Section 1 (a, b, c, d, e, f, g, h, i, j, k, l) of the Operative Part of the First Instance Verdict, the Appellate Panel made the following corrections. The Appellate Panel holds that the acts of participation of the Accused Bundalo and Zeljaja in Sections 1 a), c), d), i), j), k) l) of the Operative Part of the First Instance Verdict were properly and completely described and that they amount to accomplice liability under Article 29 of the CC of BiH.

266. Since Section 1 b) and h) explains the participation and liability of the Accused Neđo Zeljaja only, the Appellate Panel opines that the Accused Ratko Bundalo cannot be charged with these offenses because the Appellate Panel did not find JCE. His participation was not described in these Sections of the Operative Part of the First Instance Verdict, and does not meet the elements of any form of criminal liability under the CC of BiH. Therefore, the Appellate Panel acquits the Accused Bundalo of these charges.

267. The Trial Panel erroneously found that the offense under Sections 1 e), f), g) of the Operative Part of the First Instance Verdict was sufficiently explained to allow the application of Article 180(1) of the CC of BiH and the form of liability of JCE. However, these Sections name "unidentified members of the Serb Armed Forces" as the perpetrators of the offense. The nature or

[100] Commentary on the CPCs in BiH p. 612 in B/S/C version.
[101] *Bundalo* First Instance Verdict. p. 198 (the English version)

the mode of participation of the Accused Bundalo and Zeljaja was not explained at all under these Sections, nor were their alleged joint actions or participation in the common plan or purpose.

268. The Appeals Panel recalls that while it is necessary to identify the plurality of persons belonging to the JCE it is not necessary to identify by name each of the persons involved in the JCE.[103] The Panel also recalls that it is not necessary that the accused be present when the crime is committed in order to be guilty of the crime as a member of JCE.[104] An accused or another member of a JCE may use the principal perpetrators to carry the *actus reus* of a crime.[105] However, "an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question forms part of the common criminal purpose."[106] This maybe inferred, *inter alia*, from the fact that "the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose."[107]

269. The account of facts did not establish how the acts of the principle perpetrators described in Sections 1 e), f), and g) of the Operative Part were imputed to the Accused or any other accused member of the JCE. The Appeals Panel recalls that JCE is a means of perpetrating a criminal offense, but precisely the participation of the accused or how the acts of principle perpetrators were imputed to any accused member of the JCE were not explained under these Counts of the Indictment. The Trial Panel, therefore, erred in applying Article 180(1) of the CC of BiH in this case.

270. With regard to Section 2 of the Operative Part of the First Instance Verdict, the Appellate Panel finds that the participation of the Accused Neđo Zeljaja was qualified as accomplice liability, pursuant to Article 29 of the CC of BiH.[108] However, the participation of the Accused Ratko Bundalo in the prison operation was not explained in this Section, with the exception of food supply to the captives. The participation of the Accused cannot be described in general terms, nor can the

[102] *Bundalo* First Instance Verdict p. 202.
[103] *Trbic* First Instance Verdict, para. 216 citing *Brđanin* Appeal Judgment, para. 430.
[104] *Trbić* First Instance Verdict, para. 219 citing *Krnojelac* Appeal Judgment, para. 81.
[105] *Trbić* First Instance Verdict, para. 220 citing *Martić* Appeal Judgment, para. 68 citing *Prosecutor v. Martić,* IT-95-11-T, Judgment, 12 June 2007, ("*Martić* Trial Judgment") para. 438.
[106] *Trbić* First Instance Verdict, para. 220 citing *Martić* Appeal Judgment, para. 68 citing *Martić* Trial Judgment, para. 438; *Brđanin* Appeal Judgment, para. 418.
[107] *Trbić* First Instance Verdict, para. 220 citing *Martić* Appeal Judgment, para. 68 citing *Martić* Trial Judgment, para. 438; *Brđanin* Appeal Judgment, para. 410.
[108] Section 2 of the Operative Part of the First Instance Verdict: „*...Neđo Zeljaja, as the Commander of the Kalinovik SJB and as the person directly superior to the police officers on guard duty at the Elementary School of Miladin Radojević, was assigning police officers to the guard duty, he was informed by them of the crimes in which his subordinate officers and other persons were taking part, and in spite of that continued to maintain such guard system...*"

expressions like "and otherwise participated" be considered as a proper explanation of the participation of the Accused. Complex cases that involve a number of inter-connected incidents, a number of accomplices, different mode and nature of participation of a number of individuals, require specific facts relevant to the participation of the accused in the commission of the offense. In cases were JCE is pled, it has to be described and the precise role and nature of participation of the accused in the JCE must be clearly defined.

(b) Conclusion

271. Therefore, the Appellate Panel finds that the Trial Panel erroneously applied Article 180(1) of the CC of BiH, and as a result the Appellate Panel revised the First Instance Verdict by finding the Accused guilty only under those sections that were properly explained and to which relevant legal provisions can be applied.

3. Sub-Ground Three: The matter has already been decided by a legally binding verdict

(a) Appellate Panel finds that the Defense arguments are unfounded. There has been no violation of the Criminal Code, within the meaning of Article 298(c) of the CPC of BiH.

272. Article 298(c) of the CPC of BiH provides that the Criminal Code is violated, *inter alia*, when the matter has already been decided by a legally binding verdict. Only on the basis of a final court decision (verdict or procedural decision) can it be decided whether a case concerns an adjudicated matter.

(i) Appeal Arguments of the Accused Ratko Bundalo and Neđo Zeljaja

273. The Defense argue that the matter has already been adjudicated by a final verdict. The Defense submits that the Trial Panel erred, as the criminal offenses under Counts 1h) and 1 j) have been adjudicated in the *Mitar Rašević and Savo Todović* case.

274. The Defense points to Section 4c) of the Verdict in the *Rašević and Todović* case:

> From September 1992 to March 1993, after detainees FWS 109 and K.G. on 18 September 1992 were called out for an exchange and during the said period they used them on several occasions as drivers for the detection of land mines by driving ahead of Serb convoys.[109]

a. Findings of the Appellate Panel

275. Prohibition of retrial in the same criminal matter has been enshrined in the *ne bis in idem* principle set out in Article 4 of the CPC of BiH: "No person shall be tried again for the criminal offense he has been already tried for and for which the legally binding decision has been rendered."

276. This Article provides that no one shall be retried for the criminal offense he has been already tried for and for which the legally binding verdict has been rendered. This provision contains two necessary requirements[110]: (1) that the criminal proceedings have already been conducted against the specific accused for a criminal offense[111] and (2) that a legally binding verdict has been rendered.[112] Thus, the prohibition of double jeopardy relates to the person and the offense for which he/she was tried; specifically the person against whom criminal proceedings were already conducted for the criminal offense for which a legally binding verdict was rendered.

277. The right to not be tried or punished again for the same criminal matter is also provided under Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No. 7 to the ECHR. These provisions stipulate that no one shall be liable to be tried or punished again for an offense for which he/she has already been finally convicted or acquitted in accordance with the law and penal procedure of the country.

278. This principle is one based in finality. A matter decided by a legally binding verdict is regarded as final (*res judicata*) or truthful (*res judicata pro veritate habetur*) and cannot be challenged by regular legal remedies.

279. The Appellate Panel finds that Counts 1h) and 1j) do not have the character of a final adjudication on the merits in regards to the Accused. As explained above, in order for a matter to be finally adjudicated and binding on a specific Accused, it is necessary that two requirements are

[109] *Rašević and Todović* First Instance Verdict, p. 10.
[110] For this principle to be applied both requirements must be satisfied. *See* The Commentary on the CPCs in BiH p. 51.
[111] "No one shall be retried for the offense for which he/she was formerly tried." In common law jurisdictions this is the same principle known as double jeopardy.

satisfied, specifically that it is the same person and the same offense. In the present case, it is one event involving several persons in different ways. The criminal proceedings conducted against different persons for the same event does not constitute a violation of the *ne bis in idem* principle.

280. The Appellate Panel notes that Counts 1h) and 1j) are *res judicata* as to the Accused Rašević and Todović, but not in relation to the Accused Bundalo and Zeljaja. The principle *ne bis in idem* as construed by the Defense would imply the prohibition of putting on trial all persons who, through one form of complicity or another, participated in the perpetration of the offense. In this way, only persons tried in one criminal case could be held criminally liable for the acts representing one event, which is not the meaning of this principle.

(b) Conclusion

281. Consequently, the Appellate Panel finds that the Defense complaints are unfounded. There has been no violation of the Criminal Code, within the meaning of Article 298(c) of the CPC of BiH.

4. Sub-Ground Four: Legal Qualification of the Offense (Crimes against Humanity and the Crime of Persecution)

(a) The Appellate Panel finds that there is merit to the Defense argument that the Trial Panel did not properly qualify the offense.

(i) Appeal Arguments of the Accused Ratko Bundalo and Neđo Zeljaja

282. Defense for both Accused contested the legal qualification of the offense.

283. The Defense submits that the Trial Panel qualified each description of the offense as a violation of Article 172(1)(h) of the CC of BiH, in relation to subparagraphs a) murder, d) deportation, e) imprisonment, g) coercing another to sexual intercourse, etc., through to subparagraph k) other inhumane acts, which does not ensue from the factual description in any of the Verdict's paragraphs. The Defense further argues that the Panel applied Article 172(1)(k) that,

[112] "For which a legally binding court decision was rendered".

under the case law, applies if a factual description does not contain incriminations referred to in other subparagraphs of Article 172 of the CC of BiH.

284. Defense for the Accused Bundalo submits that the Trial Panel found that the Accused committed persecution on all grounds under Article 172(1)(h) – namely on political, religious, national, ethnic and cultural grounds – although no paragraph of the Verdict contains sufficient facts to support such a broad qualification. The Defense further submits that the Panel entered the legal definition of the criminal offense into the introductory part of the Verdict's account of facts. The Defense invokes the view of the ICTY that pursuant to the principle of legality a charge of persecution requires that specific acts constituting persecution be stated precisely, rather than making a general charge of persecution against an accused.

285. Defense for the Accused Zeljaja argues that the Prosecution is required to prove certain elements in order to prove the existence of the crime of persecution within the meaning of Article 172(1)(h) of the CC of BiH and, in that regard, the Defense refers to the legal elements of the criminal offense as well as the case law of the ICTY.

a. Findings of the Appellate Panel

286. Pursuant to the Indictment, the Accused are charged with the criminal offense of Crimes against Humanity in violation of Article 172(1) of the CC of BiH, reading, in part:

> (1) Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:
>
> …
>
> h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally accepted as impermissible under international law, in connection with any offense listed in this paragraph of this Code, any offense listed in this Code or any offense falling under the competence of the Court of Bosnia and Herzegovina;
>
> …
>
> shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

287. Article 172(2)(g) of the CC of BiH defines the meaning of the term 'persecution':

> Persecution means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity.

288. Elements of the offense, that is, acts of perpetration indicated under subparagraph (h), pertain to persecution against any group or collectivity on political, racial, national, ethnic, cultural, religious, sexual or other grounds that are universally considered as impermissible under international law, in connection with any offense listed in this paragraph of this article, any offense stipulated in the CC of BiH or any offense falling under the jurisdiction of the Court of BiH. In this offense, the perpetrator severely deprives one or more persons of their fundamental or human rights in violation of international law; the persons(s) is/are selected based on the identity of their group or collectivity or that specific group or collectivity is targeted. Such a selection is based on designated differences between groups or on other reasons that are universally considered as impermissible under international law.

289. General elements of Crimes against Humanity are as follows: 1) the existence of a widespread or systematic attack directed against a civilian population;[113] 2) the attack was either widespread or systematic and was directed against a civilian population; 3) a nexus between the acts of the accused and the attack.[114]

290. In the Appellate Panel's view, the Trial Panel correctly described the general elements of the offense of Crimes against Humanity under Article 172(1) of the CC of BiH and, in that regard, this Panel accepts the conclusions advanced in the First Instance Verdict in their entirety. While the Defense pointed to the general elements of this offense in their respective appeals, their arguments do not stand in opposition to the reasons adduced in the First Instance Verdict. Arguments made by the Defense in their appeals fail to refute the First Instance Verdict in terms of defining of general elements of the offense under Article 172(1) of the CC of BiH.

291. Nonetheless, the Appellate Panel finds it is necessary to clarify the legal definition of Persecution as an act of perpetration of the offense under Article 172(1)(h) of the CC of BiH.

292. Elements of the offense, that is, acts of perpetration indicated under subparagraph (h) pertain to persecution against any group or collectivity on political, racial, national, ethnic, cultural, religious, sexual or other grounds that are universally considered as impermissible under

[113] *See Rašević and Todović*, First Instance Verdict, pp. 37-38: i) a course of conduct involving multiple perpetrations of acts referred to in Article 172(1); ii) against a civilian population; iii) pursuant to or in furtherance of a State or organizational policy to commit such attack;

[114] *Id.*, i) the acts of the accused were committed as part of the attack; ii) the accused had knowledge of the attack; iii) the accused knew that his acts were part of the attack; iv) the accused knew that the attack was committed pursuant to or in furtherance of a State or organizational policy to commit such attack; v) the accused knew his acts were pursuant to or in furtherance of a policy to commit such attack, that is, the impermissible acts were committed as part of that attack and the accused had knowledge of that attack.

international law, in connection with any offense listed in this paragraph of this article, any offense stipulated in the CC of BiH or any offense falling under the jurisdiction of the Court of BiH.

293. In this offense, the perpetrator severely deprives one or more persons of their fundamental or human rights in violation of international law; the person(s) is/are selected based on the identity of their group or collectivity or that specific group or collectivity is targeted. Such a selection is based on designated differences between groups or on other reasons that are universally considered as impermissible under international law.[115]

294. Consequently, pursuant to Article 172(1)(h) of the CC of BiH, elements of the crime of persecution as a Crime against Humanity are as follows:

> 1. intentional and severe deprivation of fundamental rights;
>
> 2. contrary to international law;
>
> 3. by reason of the identity of a group or collectivity;
>
> 4. against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual or other grounds that are universally recognized as impermissible under international law; and
>
> 5. in connection with any offense listed in this paragraph of this Code, any offense listed in this Code or any offense falling under the competence of the Court of Bosnia and Herzegovina.

ICTY Appeals Chamber defined the elements of persecution as a crime against humanity, as an act or omission which:

> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and
>
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.[116]

295. In the view of the Appellate Panel, the definition adopted by the ICTY properly reflects customary international law at the relevant time. The definition of Persecution according to customary international law has been fully incorporated in the definition of persecution under Article 172(1)(h) of the CC of BiH.

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[115] *See* Commentary on the Criminal Codes in BiH, Vol. 1, (Joint Project of the Council of Europe and the European Commission), p. 565.
[116] *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 320.

296. However, two points need to be stressed. First, the discriminatory grounds determined by the ICTY – namely, racial, religious and political grounds – constitute the only ground recognized by customary international law at the relevant time and therefore it is the only ground that the Appellate Panel can take into consideration at this time. This view has been accepted in the case law of the Court of BiH. [117]

297. Secondly, the interpretation of the provision of Article 172(1)(h) of the CC of BiH in the part that reads: "in connection with any offense listed in this paragraph of this Code, any offense stipulated in this Code or any offense falling under the competence of the Court of Bosnia and Herzegovina."

298. According to the case law of the Court of BiH, the acts of perpetration of the criminal offense of Crimes against Humanity by way of persecution under Article 172(1)(h) have been legally qualified "in connection" with the acts of perpetration under subparagraphs (a) through (k) of Article 172(1) of the CC of BiH. However, as the Defense reasonably notes, the acts of perpetration of the crime of persecution in the present case are not contained in the provision of Article 172(1)(a) through (k) of the CC of BiH; instead, the Trial Panel qualified them in connection with the criminal offense of War Crimes against Civilians under Article 173(1)(e) and (f) of the CC of BiH and the criminal offense of War Crimes against Prisoners of War under Article 175(1)(b) of the CC of BiH.

299. This was not necessary. In this instance all that is necessary is for the facts to find a basis in the underlying crimes as delineated in Article 172(1) (a) through (k). Further connection with a specific Article is problematic as any given article may contain legal elements that are not necessary or integral to the crime of persecution as a Crime against Humanity. The criminal offenses of Crimes against Humanity under Article 172 of the CC of BiH, War Crimes against Civilians under Article 173 of the CC of BiH and War Crimes against Prisoners of War under Article 175 of the CC of BiH are separate criminal offenses and each has particular and distinct general elements to be proved in the course of the criminal proceedings.

300. Based on the above, the Appellate Panel finds that there is merit to the Defense argument that the Trial Panel did not properly qualify the offense. Article 172(1)(h) of the CC of BiH must be interpreted within the meaning and the spirit of the integral wording of Article 172 of the CC of BiH, but also in accordance with international case law.

[117] *See Rašević and Todović* First Instance and Second Instance Verdicts.

301. The Appellate Panel therefore notes that a proper interpretation of Article 172(1)(h) of the CC of BiH is that the crime of persecution can be perpetrated by all acts that in their entirety constitute deliberate and gross denial of fundamental rights in violation of international law by reason of the identity of a group or collectivity.

302. Only gross and flagrant denials of fundamental human rights may constitute Crimes against Humanity. An additional requirement for persecution as a Crime against Humanity is that it must be committed with a discriminatory intent. The individual criminal acts may not necessarily rise to this standard if the individual criminal act is evaluated in isolation. Therefore, for the crime of persecution the criminal acts must be taken as a whole, and together must reach this standard.

303. Based on the above, the Appellate Panel finds that the Defense claim that the Trial Panel failed to properly qualify the offense is well-founded. Specifically, the provision of Article 172(1)(h) of the CC of BiH must be read within the meaning and the spirit of the integral wording of Article 172 of the CC of BiH, but also in accordance with international case law, that is, the ICTY case law on the issue of definition of persecution.

304. The ICTY concluded the following on the acts of perpetration (*actus reus)* of persecution from its case law:

> a. A narrow definition of persecution is not supported in customary international law.
>
> b. In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person as those presently enumerated in Article 5 of the ICTY Statute.
>
> c. Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social and economic rights.
>
> d. Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice.
>
> e. As a corollary paragraph, discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theaters or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not, in and on themselves amount to persecution. These acts must not be considered in isolation.[118]

[118] *Kupreškić* Trial Judgment, para. 615.

305. Persecution is a form of discrimination on racial, religious or political grounds intended to be and resulting in an infringement of an individual's fundamental rights.[119] It is not necessary for persecution to have a separate act of inhumane nature; the discrimination itself makes the act inhumane. The crime of persecution encompasses a variety of acts, including, *inter alia*, those of physical, economic or a legal nature that infringe on an individual's basic or fundamental rights. Discrimination is one of the listed elements necessary to prove the crime of persecution has been committed.

306. Bearing in mind the above, as well as the provisions of Article 172(1)(h) and (2)(g) of the CC of BiH, this is a broad definition that may encompass acts prohibited by other subparagraphs of Article 172(1) of the CC of BiH, the criminal offenses stipulated under the CC of BiH or any offense falling under the jurisdiction of the Court of BiH. This broad definition of persecution must be interpreted within the framework of clearly defined boundaries of the types of acts which qualify as persecution.

307. *Kupreškić* Trial Chamber defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 (ICTY Statute)".

308. Bearing in mind the above, the Appellate Panel concludes that under Article 172(1)(h) of the CC of BiH, the criminal offense of Crimes against Humanity by way of persecution is a separate offense, that can be perpetrated in one of the alternative manners listed under Subparagraphs (a) through (k) of Article 172(1) of the CC of BiH, but also by acts contained in other provisions of the CC of BiH that together constitute a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 172 of the CC of BiH. It is not necessary to qualify the acts not referred to in Article 172(1) of the CC of BiH and refer to them as a specific offense located elsewhere in the Code (for example, War Crimes against Civilians in the challenged Verdict); rather, it needs to be determined if the charged act meets the abovementioned criteria and thereby, albeit defined in another provision, describes the act which constitutes the manner of perpetration of Crimes against Humanity by way of persecution. It is the view of this Panel that one must prove all the required elements of the specific act of perpetration, and the general elements of the actual act, but not all the elements that may need to be established for a specific offense as listed in another part of the Code. For example, a separate underlying act could be "application of

[119] *See Tadić* Trial Judgment, paras. 697, 710.

measures of intimidation of terror."[120] This offense is codified in Article 173. It is enough that this act is criminalized for it to be considered an underlying act to establish the crime of persecution. It is not necessary to prove or establish the other additional elements necessary to establish this act as a crime under Article 173. For this reason citing to a specific article is not necessary and only serves to confuse.

309. In the present case, the Appellate Panel finds that the Trial Panel erred in the legal qualification by erroneously qualifying the criminal offense of Crimes against Humanity under Article 172(1)(h) in conjunction with other subparagraphs of the same Article, and also in conjunction with the criminal offenses of War Crimes against Civilians under Article 173(1)(e) and (f) of the CC of BiH and War Crimes against Prisoners of War under Article 175(1)(b) of the CC of BiH.

310. Based on the foregoing, the Appellate Panel reverses the First Instance Verdict qualifying the criminal offense as Crimes against Humanity by way of persecution under Article 172(1)(h) of the CC of BiH, as follows: in relation to the Accused Ratko Bundalo, by acts referred to in Counts 1a, 1b, 1c, 1e by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, deportation or forcible transfer of population; by acts under Count 1c also by way of applying measures of intimidation and terror; by acts under Counts 1d, 1e, 1i by way of other inhumane acts of a similar character intentionally causing great suffering; by acts under Count 1f by way of unlawful and wanton destruction of property on a large scale not justified by military necessity; by acts under Counts 4a, 4b, 4c, 4d, 4e, 4f by way of murders and imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law.

311. In relation to the Accused Neđo Zeljaja, by acts referred to in Counts 1a, 1b, 1c, 1e by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, deportation or forcible transfer of population; by acts under Count 1c also by way of applying measures of intimidation and terror; by acts under Counts 1d, 1e, 1i by way of other inhumane acts of a similar character intentionally causing great suffering; by acts under Count 1f by way of unlawful and wanton destruction of property on a large scale not justified by military necessity; by acts under Counts 2a, 2b by way of imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law; by acts under Counts 3a, 3b, 3c, 3d, 3e, 3f by way of imprisonment or severe deprivation of physical liberty in violation of fundamental

[120] Article 173(1)(e) of the CC of BiH War Crimes against Civilians.

rules of international law; by acts under Counts 3b, 3c, 3f also by way of rapes; by acts under Counts 3d, 3e also by way of murders.

312. This manner of legal qualification is fully consistent with Article 285(1)(b) of the CPC of BiH, and it conforms to the elements that a charge of persecution must contain in accordance with the ICTY case law: a) the elements required for all crimes against humanity under the ICTY Statute (general elements); b) gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5 (ICTY Statute); c) discriminatory grounds.[121] Contrary to the appeal arguments, the Appellate Panel holds that it is not necessary that each individual Section of the Verdict's operative part refer to the criminal offense or paragraph defining the act whereby persecution was committed. As noted above, persecution constitutes a separate offense, and the grounds of the charge and the legal qualification are Crimes against Humanity by way of persecution; therefore, in terms of clarity and precision of the operative part, it suffices to refer to Article 172(1)(h) of the CC of BiH and provide a descriptive definition of the manner in which the persecution was committed (as has been done in the operative part of this Verdict).

313. Moreover, with respect to the Section qualified by the Trial Panel as War Crimes against Prisoners of War under Article 175(1)(b) of the CC of BiH, the Appellate Panel agrees with the view of the ICTY that crimes against humanity are committed against persons regardless of their civilian status even in cases where victims bore arms at one particular point in time. The Appellate Panel continues to hold it is not necessary to prove these additional elements required for the application of Article 175.[122] Consequently, as explained above in the reasoning as to the application of Art.173, the Appellate Panel reverses the legal qualification in relation to this Section of the First Instance Verdict's operative part, because this Section is also encompassed by the criminal offense of Crimes against Humanity by way of persecution under Article 172(1)(h) of the CC of BiH.

314. Finally, the Appellate Panel reversed the First Instance Verdict in terms of the ground(s) on which the persecution was committed. Specifically, as the Defense reasonably argues, the operative part of the First Instance Verdict cites as grounds for persecution the following statutory wording: *on political, national, ethnic and religious grounds.* It unequivocally ensues from the presented evidence and established facts that the Accused Bundalo and Zeljaja participated in the attacks against the Bosniak civilian population and in the persecution of Bosniaks, carrying out

[121] See *Kupreškić* Trial Judgment, para. 627.
[122] See Kupreškić Trial Judgment,para. 548, footnote 807.

discriminatory acts or omissions with a discriminatory intent towards Bosniaks on national, religious and ethnic grounds. Bearing in mind the above, namely that at the time of perpetration of the offense racial, religious and political grounds were the only grounds recognized by customary international law at the relevant time, the Appellate Panel maintained in the factual account *ethnic and religious* grounds for persecution and discrimination. The challenged Verdict uses the term "Bosniaks", that was not generally accepted at the time of the perpetration of the offense; the Appellate Panel accepts the terminology used in the Indictment and the challenged Verdict. In that regard, "Bosniak" is a historical, ethnic and cultural term that, among other things, encompasses a unity of faith/religion, and this Panel accepts that the ground for discrimination of the group of Bosniaks in this case can be defined as a religious ground. Ethnic, national and religious grounds are closely linked and constituent in the term "Bosniak." The term "racial" encompasses the type of discrimination based on ethnicity.[123] Therefore taking into consideration customary international law at the relevant time, the Appellate Panel accepts discrimination only on religious and ethnic grounds in this case. Furthermore, no evidence of discrimination on political grounds was presented in this case, and the Appellate Panel notes that only specific grounds need to be indicated in the Verdict's operative part. It is neither necessary nor proper to paraphrase or quote the entire wording of the law but only its relevant part.

315. The Appellate Panel intervened in the same fashion in the introductory part of Section 1 reading that the accused *"planned, ordered, perpetrated, aided and abetted the persecution…"* The description that could be defined as planning, aiding or abetting does not ensue from the account of facts and acts of perpetration. To that end, the Appellate Panel accepts that the accused ordered and committed persecution, as supported by the factual account in the particular Counts of the Indictment and/or Sections of the First Instance Verdict.

316. Based on the reasons above, the Appellate Panel reverses the First Instance Verdict in terms of legal qualification of the offense.

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[123] *See* William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press) (2006), p. 219.

VI. DECISION ON CRIMINAL SANCTION

A. STANDARDS OF REVIEW UNDER ARTICLE 300 OF THE CPC OF BIH

317. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

318. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

319. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

320. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

321. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

B. APPEALS OF PROSECUTION AND THE ACCUSED RATKO BUNDALO AND NEĐO ZELJAJA

(a) The Appellate Panel finds that the sentences in the first instance proceedings were not meted out properly and in this respect finds the appeal of the Prosecution grounded. The appeals of the Accused are not grounded and are therefore refused as such.

(i) Appeal Arguments of Prosecution

322. The Prosecution submits that the Trial Panel did not properly evaluate the aggravating circumstances and that it overestimated the mitigating circumstances on the part of the Accused. The Prosecution moves for a sentence of long term imprisonment longer than the statutory minimum.

(ii) Appeal Arguments of the Accused Ratko Bundalo and Neđo Zeljaja

323. The Defense for the Accused (as a precaution) contests the decision on the sentence as well by submitting that the sentences were not properly determined and that the Trial Panel did not properly evaluate the mitigating circumstances.

a. Findings of the Appellate Panel

324. Bearing in mind that the Prosecution points to the evaluation of the aggravating circumstances on one hand, while the Defense points to the mitigating circumstances on the other hand, the Appellate Panel will present its overall view based on the evaluation of all the circumstances.

325. The purposes of sentencing are set out in both the general and special sections of the CC of BiH.

326. Article 2 of the CC of BiH establishes as a general principle that the type and range of the sentence must be "necessary" and "proportionate" to the "nature" and "degree" of danger to the protected objects: personal liberties, human rights, and other basic values. The *type* of sentence the Appellate Panel can legally impose is limited to jail, and the *range,* under Article 172(1) combined with Article 42 of the CC of BiH, has been established as not less than 10 years or long-term

imprisonment. The distinction between a not less than 10 year sentence and a long-term imprisonment sentence relies not only on the duration of the sentence, but mainly on the consequences for the convicted person. In fact, a long-term sentence, further to a longer period of incarceration, includes: more severe restrictions on the personal liberties of the convicted person within the prison system (Art. 152 LoE[124]); less privacy as to correspondence and telephone calls (Art. 155 LoE) and a longer mandatory sentence before consideration for parole or community service (Art. 44(4) CC of BiH). On the other hand, long-term sentencing also provides for more intensive and individualized treatment for rehabilitation (Article 152(3) LoE).

327. The Appellate Panel, in addition to the general principle, must address other purposes and considerations prescribed by the CC of BiH, when determining and pronouncing a sentence: the objective criminal act and its impact on the community, including the victims; and the convicted person.

328. The Appellate Panel, in Part I below, will analyze the criminal act itself and determine the penalty that is necessary and proportionate for the crime committed by considering the relevant statutory purposes and applying the relevant statutory considerations. In Part II below, the Appellate Panel will analyze both of the Appellants individually and determine the penalty that is necessary and proportionate for each by considering the relevant aggravating and extenuating statutory considerations.

2. Sentencing Necessary and Proportionate to the Gravity of the Crime

(a) Danger and Threat to Protected Objects and Values

329. The sentence, pursuant to Articles 2 and 48 of the CC of BiH, must be necessary and proportionate to the danger and threat to the protected objects and values, which in the case of Crimes against Humanity is all of humanity.

330. Crime against Humanity by persecution poses a grave danger and threat to human protected values. Persecution itself directly threatens the fundamental value of non-discrimination on the basis of protected grounds.

[124] *The Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures*, Official Gazette No. 13/05.

(b) Suffering of the Direct and Indirect Victims

331. The sentence, pursuant to Article 48 of the CC of BiH, must be necessary and proportionate to the suffering of the direct and indirect victims of the crime. The direct victims of the crime of persecution for which the Accused have been found guilty are numerous. Their suffering was naturally great, as the victims were subjected to detention or severe deprivation of physical liberty in contravention of fundamental rights of international law, deportation or forcible relocation; the application of measures of intimidation and terror; sexual violence and other similar inhumane acts committed with the intention to inflict severe suffering; unlawful, willful and wanton destructions unjustified by military needs; killings and rape. The indirect victims include their families, their communities and all of humanity, as Crimes against Humanity threaten and infringe human dignity.

(c) Deterrence

332. The sentence, pursuant to Articles 6 and 39 of the CC of BiH, must be sufficient to deter others from committing similar grave criminal offenses against human dignity.

333. Prevention of Crimes against Humanity, namely persecution, has always been linked with impunity. These crimes must be punished, and the punishment must be sufficient to outweigh the advantages of complicity and so deter individuals in similar positions in the future.

334. In times of violent conflict, civilians are the most vulnerable. Crimes committed as part of a widespread or systematic attack directed against any civilian population and designed to benefit a party to the conflict cannot be tolerated. By punishing necessarily and proportionately those individuals who already commit such acts, others involved in future conflicts will be put on notice that there is a serious price to pay for in any way engaging in the commission of these crimes in any way. The sentence must reflect that the persons involved in a conflict continue to have the legal responsibility to obey the law. It would be impossible, for those superiors who conceive widespread or systematic attacks against civilians, to successfully persecute and terrorize an entire population without the willing criminal involvement of other individuals.

(d) Express Community Condemnation

335. The sentence, pursuant to Article 39 of the CC of BiH, must express the national and international community's condemnation of the Accused's conduct.

336. The community in this case is the people of Bosnia and Herzegovina and the entire world community, who have established, by domestic and international law, that Crimes against Humanity be unequivocally condemned and the commission of crimes against humanity be subject to effective punishment. This community has made it clear that these crimes are equally reprehensible and cannot be condoned with impunity, regardless of the side which committed them or the place in which they were committed. The legislation of Bosnia and Herzegovina reflects this same resolve. However, criminalization of this conduct is insufficient alone to show condemnation of it. In fact, appropriate penal sanctions must be imposed on those who commit these crimes in order to confirm that norms established by domestic and international humanitarian law are not merely an abstract desire or a remote aspiration.

(e) Educate as to Danger of Crime

337. The sentence, pursuant to Article 39 of the CC of BiH, must be necessary and proportionate to the need to increase the consciousness of any person to the danger of crime.

338. Trial and sentencing for this activity must demonstrate that crimes perpetrated in time of war will not be tolerated anymore and may not be committed with impunity. The crime of persecution creates a danger not only to the immediate human beings victims, but also to the humanity as a whole, contributing to an atmosphere of lawlessness, where the rule of law is undermined and the persons who identify with the perpetrator of criminal violations are encouraged to act with impunity.

(f) Educate as to the Fairness of Punishment

339. The sentence, pursuant to Article 39 of the CC of BiH, must be necessary and proportionate to the need to increase the consciousness of persons to the fairness of punishment.

340. Trial and sentencing for this activity must demonstrate not only that crimes perpetrated in time of war will not be tolerated, but also that the criminal justice process is the appropriate way to recognize the criminal violations and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the criminal act can contribute to reconciliation by providing a legal, rather than violent, response; and promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved and favors reconciliation.

3. Necessary and Proportionate to the Individual Offender

341. The statutory requirement of fairness also requires consideration of the individual circumstances of the criminal actor in addition to the criminal act.

342. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again (Arts. 6 and 39 of the CC of BiH) and (2) rehabilitation (Art. 6 of the CC of BiH).

343. There are also a number of statutory considerations relevant to the sentencing purposes of specific deterrence and rehabilitation that affect the sentencing of the individual convicted person (Art. 48 of the CC of BiH).

344. These considerations include: degree of liability; conduct of the perpetrator prior to the offense, at or around the time of the offense and since the offense; motive; and the personality of the perpetrator. These considerations, as the facts warrant, can be used in aggravation or mitigation of the sentence. The point of these considerations is to assist in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community, but also to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

345. Rehabilitation is not a purpose only imposed by the CC of BiH; moreover it is the only purpose related to sentencing recognized and expressly required under international human rights law, to which the Court is constitutionally bound. Article 10(3) of the ICCPR provides: "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

C. ACCUSED RATKO BUNDALO

346. The Appellate Panel finds that the circumstances on the part of the Accused Ratko Bundalo were not properly evaluated and that the Trial Panel did not correctly determine the sentence. However, even though the Appellate Panel finds the Prosecution appeal grounded in this portion, in determining the sentence for the Accused, it also took into account the fact that by revising the First Instance Verdict the Accused has been acquitted of charges for a certain number of criminal acts of which he was found guilty in the First Instance Verdict. The appeal of the Defense is ungrounded

in its entirety.

347. As aggravating circumstances, the Trial Panel properly stated the level of responsibility of the Accused (TG Commander; pursuant to the military hierarchy, no person was superior to him in the territory of the Kalinovik and Trnovo Municipality; as a superior officer to all members of military units in Kalinovik he had a possibility to influence the course of the events and direct them in the wanted direction), and the manner of commission of the offenses (his direct participation encouraged the soldiers to commit the same or similar offenses).

348. However, the Trial Panel erroneously evaluated as an extenuating circumstance the fact that until the time when the conflict broke out the Accused "had a correct behavior and, together with other leading figures of police and municipal authorities from Kalinovik, he held meetings with disturbed Bosniak population from Kalinovik which was told that they should not worry and that both military and civilian authority in Kalinovik had all developments under their control". According to the Appellate Panel, this is actually an aggravating circumstance. This fact cannot be viewed in isolation, but must be viewed with the actions which followed. As such it demonstrates behavior that cannot be condoned. The Accused gave a false picture of the situation to the disturbed population which trusted their neighbors in a small community. This also indicates that the Accused had an important and influential role in the social community. The abuse of this trust is grave and therefore must be considered an aggravating factor.

349. Furthermore, it is also necessary to take into account the fact that the Accused is a high-ranking professional military person, and, therefore, he was more than aware of the law of war. Specifically, he was cognizant of the rules relevant to the treatment of civilians and prisoners of war. As a professional, high-ranking officer in a small social environment he represents a role model for other soldiers, but also for other active participants in the events.

350. The fact that the Accused has no prior convictions constitutes an extenuating circumstance, which is the sole extenuating circumstance that exists on the part of the Accused.

351. Furthermore, the Appellate Panel is of the opinion that it is not necessary to explain in the decision, facts that have no impact on the decision on the sentence, which the Trial Panel described as neither aggravating nor extenuating (the behavior of the Accused after the commission of the criminal offense, his behavior during the main trial).

352. Bearing in mind the foregoing, the Appellate Panel finds that the sentence imposed in the First Instance Verdict is not adequate. Given that the First Instance Verdict is revised by

application of the previously explained standards of review and concrete considerations, the Appellate Panel finds that the only adequate sentence for the Accused Bundalo is the sentence of 22 years of long-term imprisonment.

D. ACCUSED NEĐO ZELJAJA

353. The Appellate Panel finds that the circumstances on the part of the Accused Neđo Zeljaja were not properly evaluated and that the Trial Panel did not correctly determine the sentence. However, even though it finds the Prosecution appeal grounded in this portion, in determining the sentence for the Accused, the Appellate Panel also took into account the fact that by the First Instance Verdict revision, the Accused has been acquitted of charges for a certain number of criminal acts of which he was found guilty in the First Instance Verdict. The appeal of the Defense is ungrounded in its entirety.

354. The Trial Panel properly found the aggravating circumstances (the Accused's position, the manner in which he used this position, personal participation which was as a model for the others). However, the Trial Panel overestimated the circumstances concerning the behavior, personal circumstances of the Accused and his character. The fact, that according to the testimony of certain witnesses (Jašar Vuk, protected witness "F") the Accused saved them from execution and thereby helped them in a certain manner, demonstrates the actual capacity, importance and role of the Accused. According to the Appellate Panel, a selective approach to decency and lawful behavior does not constitute an extenuating circumstance.

355. In relation to the Accused Zeljaja, the Appellate Panel also finds that only the fact that he has no prior convictions constitutes an extenuating circumstance.

356. The Appellate Panel finds the Prosecution appeal grounded. Bearing in mind the foregoing and the fact that by revising the First Instance Verdict charges against the Accused for a certain number of acts have been dismissed, the merits of the appellate arguments should be considered in this respect as well. Therefore, the Appellate Panel finds that the sentence of imprisonment for a term of 15 years constitutes an adequate sentence for the Accused Zeljaja. Therefore, the sentence imposed in the context of the revised Verdict constitutes an adequate and proportionate sentence.

(a) Conclusion

357. Pursuant to the foregoing, the Appellate Panel finds that the sentences were not properly determined in the first instance proceedings. In this respect, the appeal of the Prosecution is granted as well-founded. The appeals of the Defense are unfounded and are therefore refused as such.

Record-taker: **PRESIDENT OF THE PANEL**

Melika Murtezić **JUDGE**

Tihomir Lukes

NOTE ON LEGAL REMEDY: No appeal lies from this Verdict.

We hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.
Sarajevo, 22 April 2011

Certified Court Interpreter for English

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